110-178

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 179.

THE QUEBEC BANK, OF TORONTO, APPELLANT,

vs.

MAX HELLMAN, ASSIGNEE OF P. WEYAND AND D. JUNG, PARTNERS AS WEYAND & JUNG, SUCCESSOR TO JOHN SCHIFF AS ASSIGNEE OF SAID WEYAND & JUNG.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

**FILED OCTOBER 25, 1880.**

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati, on the first Tuesday of February, being the third day of that month, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundred and fourth—present the honorable John Baxter, judge—among the proceedings had were the following, to wit:

THE QUEBEC BANK OF TORONTO
*vs.*
JOHN SCHIFF, ASSIGNEE OF P. WEYAND AND D. Jung, partners as Weyand and Jung. } 2527. Chancery.

Be it remembered that heretofore, to wit, on the second day of August, in the year of our Lord one thousand eight hundred and seventy-seven, came the plaintiff, The Quebec National Bank of Toronto, Canada, by J. R. Murdock, its attorney, and filed in the clerk's office of the court aforesaid its certain petition in this case, clothed in the words and figures following, to wit:

2 Circuit court of the United States, southern district of Ohio.

THE QUEBEC BANK OF TORONTO, ONTARIO,
*vs.*
JOHN SCHIFF, ASSIGNEE OF P. WEYAND AND D. Jung, partners as Weyand & Young. } No. 2527.

The said The Quebec Bank of Toronto, plaintiff, says that it is a corporation organized under the laws of the Dominion of *Dominion of* Canada, and is located at Toronto, in the provence of Ontario, in said county, and is an alien and a citizen of said Dominion of Canada.

That Peter Weyand and D. Young were citizens and residents of Hamilton County, in the State of Ohio, and that by a valid deed, duly executed, the said Weyand & Jung conveyed all their property, real and personal, to John Schiff, the defendant herein, in trust, nevertheless, to convert the same into money and to pay the same pro rata to the
3 creditors of said Weyand & Jung, under and in pursuance of the insolvent laws of the State of Ohio; that the said John Schiff is a citizen of Hamilton County, Ohio, and has accepted said trust, and has been duly qualified as said trustee under the laws of Ohio, and is now proceeding to discharge said trust, whereby all the creditors of said Weyand and Jung are entitled to receive equal benefits from said property.

The said The Quebec Bank of Toronto further avers that the said Weyand & Jung were at the time of said assignment and still are indebted to the complainant in the sum of five thousand dollars, with interest thereon from April 11th, 1870, and $1.70 costs of protest, as the principals and makers of a promissory note, a copy of which is as follows:

CINCINNATI, *Feb'y 7th*, 1870.

Sixty days after date we promise to pay to the order of Geo. M. Bacon & Co. five thousand dollars, at Merchants' National Bank. Value received.
$5,000.] P. WEYAND & D. JUNG.

(Endorsed on the back:)

4 GEO. M. BACON & CO.
JOHN HUGHES.

Which note was indorsed to and delivered to the plaintiff before its maturity for value, and the plaintiff has ever since been the owner thereof. Yet neither the said P. Weyand and D. Jung or said Schiff have paid said sum, or any part thereof. And complainant further says that on the 11th day of July, A. D. 1877, he duly presented said note and a claim, duly proved, to said John Schiff, assignee, for allowance, as a valid claim against said estate of Weyand & Jung, insolvents as aforesaid under said assignment.

And the said John Schiff, assignee, refused to allow said claim or any part thereof as a valid claim against said estate of P. Weyand and D. Jung, insolvents as aforesaid.

Wherefore the complainant prays that it may be adjudged and decreed against the said defendant John Schiff, assignee of said Weyand & Jung, that he allow to plaintiff said sum of five thousand dollars, with interest thereon from the 11th day of April, A. D. 1870, and $1.70 costs
5 of protest in the settlement of his said trust, and that he also pay the costs of this suit.

J. R. MURDOCK,
*Att'y for Complainant.*

STATE OF OHIO,
*Hamilton County, ss:*

J. R. Murdock, being first duly sworn, says that he is the attorney and agent of the Quebec Bank of Toronto, which is a foreign corporation, and absent from this State.

That said petition is founded on a written instrument for the payment of money only, and that the same is in the possession of affiant as such attorney, and, further, that the facts set forth in said petition are within his personal knowledge, and are true, as he verily believes.

J. R. MURDOCK.

Sworn to before me, and subscribed in my presence, this 25th day of July, 1877.

[SEAL.] H. T. LOOMES,
*Notary Public, Ham. Co., Ohio.*

6 And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of summons, directed to the marshal of this district, and against the said defendant, clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA,
*Southern District of Ohio, ss:*

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon John Schiff, assignee of Weyand

and Jung, citizen of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the 2nd Tuesday in the month of August, 1877, to answer unto the Quebec Bank of Toronto, a corporation organized under the laws of the Dominion of Canada, in an action for the recovery of money only.

And have you then and there this writ.

Witness, the honorable M. R. Waite, Chief Justice of the United States, this 2nd day of August, A. D. 1877, and in the 102nd year
7 of the Independence of the United States of America.

Attest:

[SEAL.] THOS. AMBROSE, *Clerk.*

(Endorsed as follows:) H. C. Yergason is security for costs. Civil action for the recovery of money, $5,000.00, with interest from April 11th, 1870, and for allowance of claim.

And afterwards, to wit, on the fourth day of August, in the year last aforesaid, came the marshal to whom the said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

Received this writ at Cincinnati, O., on the 3rd day of Aug., 1877, and served the within named in Hamilton County, as follows: John Schiff, assignee of Weyand and Jung, personally, at 4 p. m., Aug. 3, 1877.

W. R. THRALL, *U. S. M.*,
By JNO. L. JEFFERIES, *Dep't.*

8 And afterwards, to wit, on the eighth day of November, in the year last aforesaid, came the defendant, by E. A. Ferguson and John F. Follett, his attorneys, and filed in the clerk's office of the court aforesaid his certain answer in this case, clothed in the words and figures following, to wit:

9 *Answer.*

In the circuit court of the U. S., southern district of Ohio.

THE QUEBEC BANK OF TORONTO, ONTARIO,
*vs.*
JOHN SCHIFF, ASSIGNEE OF P. WEYAND & D. Jung, partners as Weyand & Jung. } No. 2527.

The defendant, John Schiff, as assignee, for answer, states that there is now pending in this court, on the law side thereof, an action, No. 1612, brought by the plaintiff herein against the said Weyand & Jung, to recover the amount due on the promissory note set out in the petition filed herein, and that the defenses to said action are as follows:

First. That this court has no jurisdiction of said action against the said Weyand & Jung, because at the time said note was endorsed by said George M. Bacon & Co. and at the time the said action was brought, the said George M. Bacon & Co. and the said Weyand & Jung were

10 citizens and residents of the State of Ohio, and that they have continued so to be and are now, except the said P. Weyand, who has dec'd since said action was brought.

Second. That in the year 1869 George M. Bacon and Sanford C. Hughes, partners as Geo. M. Bacon & Co., were engaged in the business of buying and selling barley, malts, hops, and other supplies for brewers in the city of Cincinnati.

In November, 1869, Geo. M. Bacon & Co. purchased from Thos. Clarkson & Co. in Canada a cargo of 15,000 bushels of barley, for about $15,000.

They paid upon the purchase between $8,000 and $9,000, leaving an unpaid balance of $5,502.56, gold, still due Clarkson & Co. The barley was shipped, through the Quebec Bank of Toronto, to Cincinnati, and by bill of lading consigned to the Merchants' National Bank of Cincinnati, via Toledo. The bill of lading was accompanied by a draft, at twenty-five days, for the balance due, $6,502.56, gold.

By reason of the mistake or fault of the intermediate consignees at Toledo the barley was shipped by canal from Toledo directly to
11 Bacon & Co., and thus Bacon & Co. at once got possession of it upon arrival, without the knowledge of the plaintiff or the Merchants' National Bank.

The draft was accepted by Bacon & Co. upon presentation, but when it matured they were not prepared to meet it, and Mr. Sanford C. Hughes went to Canada to arrange for an extension, and by reason of negotiations then had in that behalf, Thos. Clarkson & Co. telegraphed a waiver of protest, and plaintiff instructed its agents to hold same over and not to press collection.

S. C. Hughes, on his return to Cincinnati, December 23, 1869, procured to be executed, by Geo. M. Bacon & Co., a note for $6,615.35, gold, a copy of which is as follows:

CINCINNATI, *December* 23, 1869.

Forty-five days after date we promise to pay to the order of Thos. Clarkson & Co. $6,616.35 in gold, at Merchants' National Bank. Value received.

$6,616.35.] GEO. M. BACON & CO.

Across the back was written the name—

JOHN HUGHES.

12 This note was for the amount of the draft and interest at ten per cent. until date of maturity of note, and was sent by Bacon & Co. to Thos. Clarkson & Co. to renew and take up the then over-due draft, as per arrangement made in Canada.

This note was not satisfactory to Thos. Clarkson & Co., and the plaintiff (The Quebec Bank), acting for them, inclosed the note to its agent, the Merchants' National Bank of Cincinnati, with instructions to return it to Geo. M. Bacon & Co., and to obtain from them a note in proper form (one note requiring the endorsement of Clarkson & Co.), and with other additional names to it, and the plaintiff by letter advised Geo. M. Bacon & Co. of its action in the premises; that they refused to receive the note be-

cause it was objectionable in form, and because the names were not satisfactory; and directed them, if they wanted to renew the draft, to get a new note executed in proper form, and with additional names to it.

Bacon & Co. failed or neglected to furnish any other note, and on February 2nd, 1870, the Quebec Bank directed the Merchants' National Bank of Cincinnati to demand payment from Messrs. Bacon & Co. of the draft for $6,502.56, gold, and directed it to place the barley in the hands of Perrin & Gould for sale in case the draft was not paid (the Quebec Bank supposing the Merchants' National Bank had still possession of the barley.

The Merchants' National Bank received this letter on the 5th and on the same day (Saturday) demanded payment of the draft of Bacon & Co. On the following Monday, February 7th, 1870, George M. Bacon, of the firm of Geo. M. Bacon & Co., made application to Mr. Daniel Jung, the business manager of the firm of Weyand & Jung, for assistance, and stated to Mr. Jung that the Merchants' National Bank was down on them, and that he wanted to get the barley, and asked him to execute the note in litigation for that purpose.

No consideration whatever passed from Bacon & Co. to Weyand & Jung. The note was purely accom'odation paper, and was delivered to Bacon & Co. for the sole purpose of having the note discounted by the Merchants' National Bank of Cincinnati, that thereby Bacon & Co. might be enabled to take up the $6,502.56 gold draft and get possession of the barley. On the morning of the 7th of February George M. Bacon took the note to the Merchants' Bank and offered it for discount, but the bank refused to discount the note and return' it to Mr. Bacon upon the same day.

The $6,616.35 gold note, dated December 23, 1869, which had been tendered by Bacon & Co. to the plaintiff to renew the draft, and which plaintiff had refused to receive and had returned to the Merchants' National Bank for redelivery to Bacon & Co., still remained in the possession of the Merchants' National Bank, because Bacon & Co. had neglected to call at the bank to demand it.

The Merchants' National Bank subsequently got possession of the note now in litigation on the evening of the 9th of February, 1870, but after the assignment to Hughes, as hereinafter stated. During these negotiations, and at some time after the morning of the 7th and before the evening of the 9th of February, the Merchants' National Bank learned that Bacon & Co. had obtained the barley and had sold it, and Bacon & Co. became aware that they must speedily arrange for the payment of the draft or fail in business, and the bank officers were threatening them with criminal prosecution for having obtained the barley. They made every effort to have this note discounted by other parties or to get such additional names to it as would induce the Merchants' National Bank to discount it, in all of which they failed.

And because the bank refused to discount this note, they being unable to procure assistance elsewhere, George M. Bacon & Co., on the afternoon of the 9th of February, 1870, at about 3 o'clock, made an assignment of all their property, of every description, to John Hughes, who accepted said trust as assignee for the benefit of their creditors.

On the 9th of February, the Merchants' National Bank, without any

authority from any person, protested the $6,616.35 gold note for non-payment.

16 At the time this note was thus protested, it had never been indorsed by the payees, Thos. Clarkson & Co., and several days after it had been protested the Merchants' National Bank sent it to Canada, to plaintiffs, for the indorsement of Thos. Clarkson & Co.; and then said Thos. Clarkson & Co. did indorse said note without recourse.

At the time the Merchants' National Bank obtained possession of the note in litigation, it was agreed, as is claimed by the officers of the bank, that John Hughes, who had before signed his name on the back of the $6,616.35 gold note, would come into the bank and sign his name across the back of the note now in litigation (the Weyand & Jung note). In pursuance of this understanding, John Hughes did, on the morning of the 10th or 11th of February, go to the Merchants' National Bank and sign his name on the back of the said note. John Hughes was a stranger to the note, it never having been indorsed or delivered to him, and his name nowhere appeared in the note; and the legal obligation which he intended to and did assume by thus signing the note was that of maker.

17 The understanding or agreement made at the time the bank received the note for John Hughes to sign it, and his subsequent signing in pursuance thereof, were all done without the knowledge of Weyand & Jung, or either of them.

On the morning of the 10th of February, Mr. Daniel Jung called at the Merchants' National Bank, and made inquiry for this note, and was informed that it was not there by the officers of the bank; he then notified them not to take the paper; that it was without consideration and void, and that he would not pay it.

And the defendant adopts and makes the same defense herein, and for a further defense says:

That he denies that the said plaintiff is the owner of the said note; that he is informed and believes, and so states the fact to be, that the plaintiff has no interest in the said note, because the said draft of $6,502.56 was paid to it by said Thomas Clarkson & Co. long prior to the pre-

18 sentation of the plaintiff's claim in this suit to him as assignee for allowance.

Wherefore the defendant asks that this suit be dismissed at the cost of plaintiff.

JOHN F. FOLLETT,
E. A. FERGUSON,
*Attorneys for Def't.*

THE STATE OF OHIO,
*Hamilton Co., ss:*

John Schiff, being sworn, says that he believes the statements made in the foregoin answer to be true.

JOHN SCHIFF, *Assignee.*

Subscribed in my presence and sworn to before me this 7th day of November, A. D. 1877.

[SEAL.] EDWARD C. FERGUSON,
*Notary Public, Ham. Co., O.*

19 And afterward, to wit, on the fourteenth day of February, in the year of our Lord one thousand eight hundred and seventy-eight, an entry was made upon the journal of said court in said case clothed in the words and figures following, to wit:

THE QUEBEC BANK OF TORONTO
*vs.*
JOHN SCHIFF, ASSIGNEE. } 2527. Chancery.

It appearing to the court that John Schiff, defendant herein, has deceased since the commencement of this action, and that Max Hellman has been duly appointed as assignee of the said late partnership of Weyand and Jung, and has succeeded to said trust, now, by consent of the parties, the said Max Hellman, assignee as aforesaid, is hereby made party defendant in this cause. And the said Max Hellman, assignee, by his attorneys Long, Kramer and Kramer, hereby waives the issuance and service of process herein and enters his appearance.

20 *Replication.*

In the circuit court of the United States, southern district of Ohio.

THE QUEBEC BANK OF TORONTO, ONTARIO,
*vs.*
JOHN SCHIFF, ASSIGNEE OF P. WEYAND AND D. JUNG, partners as Weyand & Jung. } In equity.

The replication of the Quebec Bank of Toronto, Ontario, to the answer of John Schiff, assignee of P. Weyand and D. Jung, partners as Weyand and Jung, adopted by the defendant, Max Hellman, as successor of John Schiff in said trust.

The repliant, saving and reserving all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says that they will aver and prove the said bill to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient in law to be
21 replied unto by the repliant; without this that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready and *and* willing to aver and prove, as this court shall direct, and humbly prays as in and by the said bill it has already prayed.

STALLO & KITTREDGE AND
J. R. MURDOCK,
*Solicitors for Complainant.*

22 Circuit court of the United States, southern district of Ohio.

THE QUEBEC BANK OF TORONTO
*vs.*
MAX HELLMAN, ASSIGNEE OF WEYAND & JUNG.

It is hereby agreed and stipulated:

(1.) That the note set out in complainant's bill is in words and figures following:

CINCINNATI, *Feb. 7th*, 1870.

Sixty days after date we promise to pay to the order of Geo. M. Bacon & Co. five thousand dollars at Merchants' National Bank, value received.
$5,000.] P. WEYAND & D. JUNG.

[$2.50 U. S. internal revenue stamp.]

(Endorsed on the back:)

GEO. M. BACON & CO.
JOHN HUGHES.

It is stipulated that the signatures of the makers of said note were signed by D. Jung and the signatures of the endorsers are genuine, and that said copy may be offered in evidence in this cause, and that it shall have the same force and effect in testimony as the original.

(2.) It is also stipulated and agreed that on December 26th,
23 1874, P. Weyand and D. Jung made an assignment of all their firm assets and individual property to Schiff, now deceased, under the insolvent laws of Ohio prior to the filing of this suit.

That since the commencement of this suit said John Schiff dec'd and that Max Hellman has been duly appointed his successor, and qualified as assignee of said Weyand & Jung, both as partners and as individuals, and has been duly qualified as such, and is now administering said trust.

(3.) It is also stipulated and agreed that the said Quebec Bank of Toronto did, on the 25th February, 1870, institute in the superior court of Cincinnati, No. 25784, a suit against Geo. M. Bacon & Co., makers, and John Hughes, endorsers, upon a note for $6,616.35, dated December 23rd, 1869, at 45 days, payable to the order of Thos. Clarkson & Co., & endorsed by them, and that on the 25th day of March, 1871, and no judgment having as yet been obtained thereon, the said Quebec Bank filed its amended petition in said cause, setting forth that the said note of Weyand & Jung for $5,000 (the subject-matter of this suit) was
24 taken as payment on said note of $6,616.35, and praying judgment for $1,616.35, the balance due, with interest.

STALLO & KITTREDGE, AND
J. R. MURDOCK,
*Att'ys for Quebec Bank.*
JOHN F. FOLLETT AND
ADAM A. KRAMER,
*Att'ys for Defendant.*

25 *Stipulation No. 2.*

A.

DANIEL JUNG:

It is my signature on this note. George M. Bacon came up. I was sick on the 7th of February. He told me that the bank was down on them, and that he wanted to get the barley, and asked me for this note. He said Kauffman & Co. would do nothing, so I gave him the note as accom'odation. We were not indebted to them; Bacon & Co. gave us this note. It was for $5,000, and dated on the 3rd of February; it was the last one they ever gave us; I went down on the 10th of February, I think, to Larkins bank, and I heard that Geo. M. Bacon & Co. had made an assignment; I went to the Merchants' National Bank and asked the teller if they had this note, and he went to Mr. Yergason and asked him if they had got the note; Mr. Goettle asked Mr. Yergason if they (he) had the note, and Mr. Goettle came and told me no; I told them they shouldn't take it because it was accom'odation, and we would not pay it. This was an accom'odation note, and without consideration between us; Mr. Goettle asked if Yergason had this note, and said to me he had not.

B.

I never had any conversation with Mr. Jung; I think I had a conversation with Mr. Goettle about it; I can't state the day; I think
26 Goettle asked me if we had such a note, and I told him we had; I did not have possession of it; we had already taken it; it is my recollection, I told Goettle we had such a note; I may have testified before that I did not recollect words; I do not know the words now.

C.

I did not know Weyand and Jung personally at that period; may have seen them, but did not know them.

While the note of Weyand & Jung was in my possession, on the 11th, J. Goettle asked me in my room about it. The note was in my drawer; I had not delivered it to Mr. Yergason yet; it was, I think, either the morning of the 10th or the morning of the 11th; I did deliver it to Mr. Yergason; Mr. J. Goettle, our teller, came in and said Mr. Jung had sent him to ask about Weyand & Jung's note; I don't remember the language; I asked what they wanted; don't remember what reply was made; I looked through the glass door of my room and saw a man's face wonderfully like Mr. Jung here; I did not recognize the face until I saw it in profile yesterday; I told Mr. Goettle that the note had been received, mentioning when, for the Quebec Bank of Toronto, and I was going to send it off that night; Mr. Jung had no conversation with me.

27 *Stipulation No. 2.*

U. S. circuit court, southern dist. of Ohio.

QUEBEC BANK OF TORONTO
*vs.*
JOHN SCHIFF, ASSIGNEE OF WEYAND & JUNG. } 2527. Stipulation.

In this case it is agreed and stipulated that on the 7th day of February, 1870, the date of the note for five thousand dollars set out in the bill herein, P. Weyand and D. Jung, partners as Weyand & Jung, were both citizens and residents of Hamilton County, in the State of Ohio, and continued so until the time of the death of each respectively; that John Schiff, assignee of said Weyand & Jung, was a citizen and resident of the State of Ohio until the time of his death, and that Max Hellman, present assignee and successor of said Schiff, is and has been since the time he became such assignee a citizen and resident of said State of Ohio.

It is further agreed and stipulated that at the date of said note Geo. M. Bacon & Co. was a firm doing business in Hamilton County, in said State of Ohio; that Geo. M. Bacon, one of the members of said firm, was a resident of the State of Kentucky at the time of the execution of said note, and continued to be a resident of said State until the time of
28 the bringing of this suit; that Sandford C. Hughes, the other member of said firm of Geo. M. Bacon & Co., was at the time of the execution of said note, and ever since has been and still is, a citizen and resident of the State of Ohio.

It is further agreed and stipulated that the plaintiff in this case, The Quebec Bank of Toronto, Ontario, is a corporation organized under the laws of Canada, and doing business at Toronto, Ontario, in Canada, and an alien. It is further agreed and stipulated that a suit was brought on said $5,000 note by said plaintiff, The Quebec Bank of Toronto, against Peter Weyand, Daniel Jung, et als., in the superior court of Cincinnati, Ohio, case No. 26050, in which case the said Peter Weyand and Daniel Jung filed an answer denying their liability upon said note, averring that said note was not the property of said plaintiff, and that the said note was obtained without consideration and held in fraud of their rights; that after the filing of said answer the said plaintiff dismissed its action, but the said defendants, Weyand & Jung, claiming that *there* answer under the practice in Ohio amounted to a cross petition asking affirmative relief, and it being so adjudged by the said superior court, said cause came on for trial before Alfred Yaple, one of the judges of said court,
29 upon the issues presented by said answer and the reply of said plaintiff thereto, and upon said trial Daniel Jung was called as a witness to testify on behalf of said Weyand & Jung, and the defendant herein called John J. Glidden as a witness to prove what said Daniel Jung testified to on said trial, and to prove that said Daniel Jung is now deceased, and it is conceeded and stipulated that said John J. Glidden would testify that said Daniel Jung is now deceased; that he heard said Daniel Jung testify on said trial before said Alfred Yaple, and that his testimony on said trial was as set forth on page 23 of the record of said case as printed and used in the prosecution of a petition in error by said plaintiff in the superior court of Ohio, and it is stipulated and agreed that

if, in the opinion of the court, it is competent in this case to prove what was testified to by said Daniel Jung in the trial of said case in said superior court that the said testimony as set forth on page 23 of said record was the testimony of Daniel Jung upon said trial. It is further agreed and stipulated that upon the hearing of said case in the supreme court of Ohio upon proceedings in error prosecuted in said court, the said supreme court held and adjudged that the said supreme court had no jurisdiction to hear and determine any controversy in said case between the parties hereto after the same had been dismissed by said plaintiff.

And it is further agreed and stipulated that the exhibits set forth in said record are correct copies of the originals therein referred to, and of which they purport to be copies, and that all and each of said exhibits may if denied by either of the parties hereto for the purposes of this trial be used in evidence, or such parts of the same as the parties may desire to use, in lieu of said originals, including herein the deposition of D. J. Fallis, marked in said record "Exhibit 8."

And it is further agreed that the testimony of D. J. Fallis and H. C. Yergason upon the subjects testified to by Mr. Jung on pages 24 to 38 inclusive, of said record may be made if the testimony of Mr. Jung is admitted. The testimony of Mr. Jung, Fallis & Yergason is hereto attached, marked Exhibits A, B, & C.

KITTERIGE &
J. R. MURDOCK,
*For Pl'ffs.*

Deposition' of sundry witnesses taken before me, John H. Woodward, a notary public within and for the county of Hamilton and State of Ohio, on the 19th day of November, in the year 1878, between the hours of 8 o'clock a. m. and 6 o'clock p. m., at my office in the city of Cincinnati, in said county of Hamilton, pursuant to the annexed notice and order of court herein, to be read in evidence in an action pending in the circuit court of the United States for the southern district of Ohio, in which the Quebec Bank of Toronto is plaintiff and Max Heillman, assignee of Weyand and Jung, is defendant.

Present, on behalf of the complainant, J. R. Murdoch, esq., & E. W. Kitridge, esq., and J. F. Follett, esq., on behalf of the defendant.

EXHIBIT H.

K. F. BENNDORF, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and saith as follows:

Ques. 1. Please state your name, age, residence, and occupation.

Ans. My name K. F. Benndorf; my age is thirty-eight (38); my residence, Covington, Kentucky, and am secretary of the Farmers' Insurance Company of Cincinnati.

Ques. 2d. What was your occupation during the year 1870?

Ans. I was individual book-keeper for Larkin, Wright & Co.

3d. Int. How long were you employed in that bank and when did you leave that employment?

Ans. I was employed as such individual book-keeper from July, 1867, until December 31st, 1874.

4. Int. Please state if during that time Peter Weyand and Daniel Jung, partners Weyand & Jung, kept an account at your bank?

Ans. They did.

5. Int. Please state whether or no you are familiar with the signature of said firm and what your means of knowing it was.

Ans. I am familiar with the signature of the parties through their checks on the bank, which checks went through my hands to be charged to their account for some time, several years, probably.

6. Int. Please look at the note now presented to you and say, if you can, by whom that note was written and by whom executed?

33 Ans. The note is written by one of the firm of George M. Bacon & Co., and signed by Weyand & Jung.

7. Int. Please state how you *en*dentify said signature of Weyand & Jung, and state, if you can, by which of the parties the note was signed.

Ans. By the particular way of signing the initials of both of the parties, and I think D. Jung signed the same—and I know D. Jung signed the same, by his signature.

(A copy of said note so indentified is marked by the notary "Exhibit A," and by agreement of counsel a copy thereof is hereto annexed in lieu of the original.)

EXHIBIT A.

CINCINNATI, *Feb.* 7, 1870.

Sixty days after date we promise to pay to the order of Geo. M. Bacon & Co. five thousand dollars at Merchants' N. Bank. Value received. $5,000.]

(Signed) P. WEYAND & D. JUNG.

(Endorsed:)

GEO. M. BACON & CO.
JOHN HUGHES.

[$2.50 int. rev. stamp.]

Protested April 11, '70. # 205.

J. D. HENRY, *N. P.*

8. Int. Please state if you know the writing of Geo. M. Bacon

34 & Co., and state how you know it, and by whom the body of the note was written?

Ans. I know the handwriting of the party writing the note to be a representative of Geo. M. Bacon & Co., being familiar with the handwriting of the firm through checks on Larkin, Wright & Co., with whom they used to deal as depositors, the checks being charged by me to their account.

9. Int. Please state if you have ever seen Weyand & Jung write the signature of the firm; and if so, how often?

Ans. I think I have seen D. Jung write the signature of the firm in the bank years ago.

Cross-examination conducted by J. F. FOLLETT, esq., for the defendant:

1. X Int. What was the firm name under which Peter Weyand & Daniel Jung did business, if you know?

Ans. Weyand & Jung, although the accounts I kept might have been headed on the ledger P. Weyand & D. Jung; they were generally known under the name of Weyand & Jung. They signed their checks, however, P. Weyand & D. Jung.

35 2. X Int. You say their account might have been headed P. Weyand & D. Jung; do you know whether or not it was so headed?

Ans. I think it was headed that way.

3. X Int. When did you last see that account?

Ans. That is a question I can't answer positively; it must have been between 1867 & 1874, while I was book-keeper.

4. X Int. Were both the signatures, P. Weyand and D. Jung, in the same handwriting?

Ans. They are in the handwriting of D. Jung.

5. X Int. Can you swear positively that you ever saw D. Jung write or sign his name, or his firm name?

Ans. I have seen D. Jung sign the firm name only.

6. X Int. How often, and when and where?

Ans. At least once, in Larken & Wright & Co.' bank.

7. X Int. To what did he sign the firm name on that occasion?

36 Ans. I think to a check taking up a note. This, however, I am not positive about.

8. X Int. In your position as book-keeper in the bank, you had nothing to do with the payment o' checks or the determination of the genuineness of signatures, had you?

Ans. I had nothing to do with the payment of checks, but had to be familiar with the signature of all the depositors of the bank, because I would not charge up a check the signature to which I did not know or did not think was genuine.

9. X Int. Did you ever see P. Weyand write?

Ans. I did not.

K. F. BENNDORF.

EXHIBIT I.

CHRISTOPHER LADENBIERGER, of lawful age, being duly cautioned and solemnly sworn, deposeth and saith as follows:

1. Int. State your name, age, residence, and occupation.

37 Ans. My name is Christopher Ladenbeirger; my age is 38; my residence Belleview, Kentucky; my occupation, paying teller in the Merchants' National Bank. Has been there since the bank was organized.

2nd. Int. Please state what was your occupation in the year 1870?

Same as now. I was paying teller in that bank.

3d. Int. Please state if you are familiar with the signatures of the late firm of George M. Bacon & Co?

I am familiar with the firm signature; have paid checks on it. They used to keep an account with the bank.

Please examine the note heretofore copied as Exhibit A, and state if you know the endorsement on the back thereof?

I would not swear that it was the genuine endorsement of George M. Bacon & Co. But my opinion is that it is the genuine endorsement. I would pay checks on it. I did not see him make it; of course I can only swear to my opinion.

38 Cross-examination:

1. Int. Of whom did the firm of George M. Bacon & Co. consist?

That I cannot say.

2. Int. What member or members of the firm did you ever see write?

George M. Bacon I did see write, the other—I don't know who his partner was. I know his signature on the book, and that is all I do know about it.

3rd. Int'g. Did you see the signature written on the book?

That I cannot say. I don't remember.

4th. Int'g. Is it not *time* that all you know certainly with reference to the signature of George M. Bacon & Co. is what you learn from the signature-book of the Merchants' National Bank and the payment of checks over the signature of George M. Bacon & Co. resembling the signature in said book?

Yes, sir; to the best of my knowledge.

(Signed) C. LANDENBURGER.

39 EXHIBIT K.

EDGAR STARK, of lawful age, being by me first examined, duly cautioned, and solemnly sworn, deposeth and saith as follows:

1st. Intg. State your name, age, residence, and occupation.

My name is Edgar Stark; my residence is Covington, Kentucky; my age, 26 years; my occupation, receiving teller in the bank of J. F. Larkin & Co. I have been in that bank since 1868. In 1870, the name of the bank was Larkin, Wright & Co.

2d. Intg. Please state, if you know, the signatures of the late firm of Weyand & Jung, and what were your means of becoming familiar with it.

I was familiar with the signatures of said firm, as at that time (1870) all the checks went through my hands and they had a considerable number.

3rd. Intg. From your knowledge of such signature, please state, after looking at the note hereinabove copied as Exhibit A, *and state* whose signature is at the bottom of said note.

40 It is my opinion that that is the signature of Weyand & Jung, but I could not say which of the firm signed it.

4th. Intg. Please state the form usually made use of by the firm in signing their name.

P. Weyand & D. Jung; that was their usual form of signature.

Cross-examination:

1. Int. X. Did you ever see either of the members of said firm write? If so, when, where, and how often?

Yes; in making endorsements at the counter on check for deposit.

2nd. Int. X. How lately have you seen either member of the firm write?

It would be impossible to state that, as I don't know just when they closed their account.

3d. Int. Do you remember when their account closed and when it was commenced with Larkin, Wright & Co.'s bank?

41 I am not positive. I could tell by the books exactly. It was about the time of the temperance crusade. They left at that time. I think it was in about 1874.

4. Int. X. Is not your opinion with reference to the signature of the note formed from a comparison with a signature found in the signature-book of Larkin, Wright & Co.?

It is not. I have not examined those signatures until I came here this afternoon; that is, the signature in the book.

5th. Int. X. From what, then, do you form your opinion of the signature on the note?

From my knowledge of their signatures on checks, notes, and endorsements.

6th. Int. X. Have you seen any of their signatures since the year 1874?

I could not answer that question as I don't know; but I have, I think.

42 Is your opinion based simply upon your recollection of their signature?

It is.

(Signed) EDGAR STARK.

The further taking of the depositions is adjourned until Wednesday, November 20th, 2½ o'clock p. m.

(Signed) J. H. WOODWARD, *N. P.*

NOVEMBER 20, 1877.

At 3 o'k p. m. the taking of testimony was resumed, pursuant to adjournment.

Pres't: J. F. Follett, esq., for defendants, and J. R. Murdock, esq., for complainants.

(Signed) J. H. WOODWARD,
*Notary Public.*

EXHIBIT A.

JAMES R. MURDOCK, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and saith as follows:

1st. Int. Please state your name, age, residence and occupation.

My name is James R. Murdock; my age is over 30 years; my residence is Cincinnati, and my occupation is that of an attorney at law.

2nd. Int. State, if you know anything about the presentation of this claim to the assignee.

43 As attorney for the Quebec Bank I have had possession of this note since 1870, and on the 10th day of July, 1877, I presented a sworn affidavit with a copy of the note to John Schiff, their assignee. On the first day of August, 1877, Mr. Schiff, in my presence, rejected same claim in writing. The original of this claim as presented and his written rejection thereof is hereto attached, and marked "Exhibit B," and made part of my answer.

(Signed) J. R. MURDOCK.

The further taking of the depositions is adjourned till Thursday, Nov. 21, at 3 o'clock p. m.

(Signed) J. H. WOODWARD,
*Notary Public.*

NOV. 21ST, 1878.

At 3 o'k p. m. the taking of testimony was resumed, pursuant to adjourn't.

(Signed) J. H. WOODWARD,
*Notary Public.*

DANIEL J. FALLIS, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and saith as follows:

44 1st. Int. Please state your name, age, residence, and occupation.

My name is Daniel J. Fallis; my age is 69; residence, Covington, Kentucky; occupation, banking, in Cincinnati, O.

2. Int. Please look at the note of Weyand & Jung for $5,000, at 60 days, to the order of George M. Bacon & Co., and endorsed by George M. Bacon & Co. and by John Hughes, being the same of which a copy is attached to this deposition, and marked "Exhibit A," above. After looking at said note, please state if you know the signatures of the makers and endorsers thereof; and, if so, state what your knowledge is and your means of knowing.

I do not know the signatures of the makers and endorsers of said note. Mr. D. Jung acknowledged that the note was made by his firm. I am also familiar with the signature of the firm, having discounted their paper frequently. I am very familiar with the signature of George M. Bacon & Co., that firm having kept an account with the Merchants'

45 National Bank, of which I was then, and have been ever since its organization, president; and this signature I recognize as the signature of the firm. As to the endorsement of John Hughes, I saw him write it at my office on this note.

(Signed) D. J. FALLIS.

CINCINNATI, *Febr. 7th*, 1870.

Sixty days after date we promise to pay to the order of Geo. M. Bacon & Co. five thousand dollars, at Merchants' National Bank, value received. $5,000.00.]

P. WEYAND & D. JUNG.

[U. S. rev. stamp, 2.50.]

(Endorsed on back:)

GEO. M. BACON & CO.
JOHN HUGHES.

(Also:) 1.50 protest charges; 40c. affidavit.

STATE OF OHIO,
*Hamilton County, ss:*

J. R. Murdock, being sworn, says that he is agent and attorney of the Quebec Bank of Toronto, the owner of the annexed claim against the assignment of P. Weyand & D. Jung, insolvents. Affiant further says, upon

oath, that said claim is just, due, & unpaid, and that there are no credits or offsets against the same to the knowledge and belief of affiant.

(Signed) J. R. MURDOCK.

46 Sworn to before me and subscribed in my presence this 10th day of July, 1877.

(Signed) H. T. LOOMIS,
*Notary Public, Ham. Co., Ohio.*

40c. paid notary.

EXHIBIT B.

THE STATE OF OHIO,
*Hamilton County, ss:*

I, John H. Woodward, a notary public in and for the county and State above mentioned, duly commissioned and qualified, and appointed pursuant to order of court to take testimony, do hereby certify that the above-named K. T. Beundorf, Christopher Ladenburger, Edgar Stark, Jas. R. Murdock, and D. J. Fallis, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed as above set forth, were reduced to writing by self in the presence of the witnesses respectively, and were subscribed by the said witnesses respectively in my presence, and were continued from day to day as above set forth; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit, and
47 that said depositions were taken at the time and place specified in the notice attached.

In testimony I have hereunto set my hand and official seal this 21st day of Nov., 1878.

(Signed) JOHN H. WOODWARD,
*Notary Public.*

Not. fee, $8.00, paid.
J. R. MURDOCK, *Pl'f, Att'y.*

48 Depositions of sundry witnesses taken before me, John H. Woodward, a notary public, within and for the county of Hamilton, in the State of Ohio, on the 29th day of January, A. D. 1879, between the hours of 8 o'clock a. m. and 6 o'clock p. m., at the office of J. R. Murdoch, esq., NE. corner of Third and Main streets, in the city of Cincinnati, in the county of Hamilton, and State of Ohio, pursuant to the annexed notice and order of court heretofore made, to be read in evidence on behalf of the plaintiff, in an action pending in the circuit court of the United States for the southern district of Ohio, in which the Quebec Bank, of Toronto, is plaintiff, and Max Hellman, assignee of Weyand & Jung, is defendant.

Present: J. R. Murdoch, esq., of counsel for plaintiff.

EXHIBIT F.

DANIEL J. FALLIS, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and saith as follows, viz:

Ques. 1. Please state your name, age, residence, and occupation.

Ans. My age is 69; my residence, Covington, Kentucky; occupation, banking; my name is Daniel J. Fallis.

49 Ques. 2. Please state what bank you are connected with, and whether it is a correspondent of the Quebec Bank of Toronto?

Ans. I am connected with the Merchants' National Bank of Cincinnati, and have been president of it since its organiztion in 1865. It was in the years 1869 & 1870 and since a correspondent of the Quebic Bank of Toronto.

Ques. 3. State if your know the firm of Geo. M. Bacon & Co., and if you knew the firm of Weyand & Jung in their life-time.

Ans. I was well acquainted with firm of Geo. M. Bacon & Co., and knew considerable about the firm of Weyand & Jung.

Ques. 4. I call your attention to the note in controversy in this case for $5,000, dated February 7th, 1870, at 60 days, made by Weyand & Jung to the order of George M. Bacon & Co. Now please state if you know said note, and if you know who is the owner thereof.

Ans. I do know the note. The Quebec Bank of Toronto is the owner.

50 Ques. 6. Please state when that note came into the possession of the plaintiff, and if you had anything to do with it, or its transfer to the Quebec Bank. Please state the history of the transaction.

Ans. On the mornimg of the 7th of February, 1870, George M. Bacon left said note in my hands as president of the Merchants' National Bank, for discount. It was brought with other notes at noon, the hours of discount into my room. The discount committee declined discounting said note. I did not see Bacon personally in the morning when he left the note on the cashier's desk; but during the afternoon, and when Mr. Bacon called to learn the result, I saw him and informed him that the paper had not been discounted by the Merchants' National Bank. He then stated as an argument why it should be discounted, that the proceeds were for a payment on a claim for barley received by us as correspondents of the Quebec Bank. Whereupon I informed him that we would discount the paper for the Quebec Bank, and credit proceeds on his obligation which we held for that bank. Mr. Bacon asked for the note, that he might see another party and return same in a short time if he did not make other arrangements,

51 which other arrangements were to return the note, or to bring the proceeds in money aforesaid. Mr. Bacon returned the note, and handed it to our cashier, Mr. Yergason. About this time I learned, for the first time through Mr. Yergason, in the presence of Mr. Bacon, that the barley which we thought was in possession of the railroad under a bill of lading which we he'd, had already been delivered to George M. Bacon & Co., without our authority. My language I do not remember, but communicated to Mr. Bacon my severe censure of his conduct in very plain terms for having obtained the property under the circumstances. The note was left with us at that time; I told him it would not be discounted to check against, but we would take it and credit proceeds on claim of the Quebec Bank, taking said note on account of said Quebec Bank. The above transaction being late on the afternoon, Mr. Bacon left, promising to call in the morning. I left the note with our cashier while talking with Mr. Bacon, and when Mr. Bacon left the cashier and I had some conversation in regard to the bad faith of Bacon & Co. in this transaction, after which I took the note and laid it in my drawer. The following morning

George M. Bacon called very soon after 9 o'clock, as I hoped to
52 complete the transaction, but being informed that his account was overdrawn, and that he must pay for the stamps ($2.50) he left, promising to bring the overdraft and price of stamps and come up immediately and complete this business, which he did not do, neither did I see him for months after; but I made a memorandum during the day, which was put in the stamp-box, for in lieu of a stamp which stamps was pinned to the note, or I should of said H. C. Yergason, the cashier, made the memorandum at my direction and I placed it in the box.

Ques. 6. What conversation, if any, did you have that day with Mr. Bacon as to the endorsement of John Hughes?

Ans. Mr. Bacon promised at that interview that Mr. John Hughes should call and endorse the $5,000 note in suit, because it went as a credit on what Mr. Hughes was already an endorser; after this Mr. Bacon left.

Ques. 7. What did you do with the note then? Where did it remain, and what next occurred in relation to it?

53 Ans. The note remained in my care for about two days, I think, when Mr. Hughes, on the 10th of February called to endorse the note as I had requested, and as Mr. Bacon had promised. I was not personally acquainted with Mr. Hughes; he introduced himself. I had sent no messenger for him, and had not written to him; he came in without any act of mine.

Ques. 8. Please state what Mr. Hughes did after he had arrived at your bank and introduced himself.

Ans. Mr. Hughes came into the president's room at the Merchants' National Bank and introduced himself by saying that George M. Bacon has sent him there to endorse the $5,000.00 note in question. He offered to endorse the note then; I went and got it, whereupon he said he would endorse it as assignee of Geo. M. Bacon & Co., when I told him he would do no such thing, as he, by virtue of being assignee was already as such an endorser; that he would endorse it individually or not at all, mentioning that he was already on the previous obligation for which this was a credit as part payment, and therefore would not increase his liability. This was the first intimation I had of the failure of George M. Bacon. Mr.
54 Hughes then endorsed the note individually in my presence and without any reserve.

Ques. 9. Please state if there were any reservations as to the receipt of this note in question at the time you talked with Bacom on the morning of the eighth.

Ans. None whatever. The taking of the note was a positive fact then understood. I did remark to Mr. Bacon, however, not as a condition, but as a matter of justice, that as the proceeds of this note was to be credited on a former obligation on which Hughes was endorser, that he should endorse this, and I further stated that we would take this at all events.

Ques. 10. What did you next do with the note, and what instructions did you give Mr. Yergason?

A. I handed it, I think, to Mr. Yergason, our cashier, on the same day requesting him to notify the Quebec Bank of our action. I am under the impression that Mr. Yergason was busy and did not write the Quebec Bank until next day.

D. J. FALLIS.

55 Adjourned to 3 o'clock, p. m., January 30th.

*Jan'y* 30.—3 p. m.

Parties met and, by consent, adjourned till 9 o'clock a. m., Feb'y 1st.

J. H. WOODWARD,
*Notary Public.*

FEB'Y 1ST, 1879.

Depositions resumed pursuant to adjournment.
Present: James R. Murdoch, counsel for plaintiff.

J. H. WOODWARD,
*Notary Public.*

EXHIBIT G.

H. G. YERGASON, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and saith as follows, to wit:

Ques. 1. Please state your name, age, residence, and occupation.

Ans. My name is H. C. Yergason; my age is thirty-nine years, and I reside*de* in Cincinnati, Ohio; my occupation is that of cashier of the Merchants' National Bank of Cincinnati.

Ques. 2d. What was your occupation in the year 1869 & 1870?

56 Ans. I was cashier of the Merchants' National Bank of Cincinnati, and have *been* rema'ned so ever since.

Ques. 3d. Please state if you know the firm of George M. Bacon & Co.; and if so, how long have you known it?

Ans. I was acquainted with the firm of George M. Bacon & Co. during the years of 1869 & 1870.

Ques. 4. Do you recollect anything about the note of Weyand & Jung sued on in this case, dated February 7th, 1870, for $5,000 at 60 days?

Ans. The note of Weyand & Jung, dated February 7th, 1870, $5,000, at 60 days, was left with me on the morning of that day, for discount; I hanned the same to the president of the Merchants' National Bank, Mr. Fallis, but was not discounted by that bank.

Ques. 5. What was done with that note; when did you next see it; and state if it ever came into your possession again, and who is the present owner of it, if you know?

Ans. I next saw the note in the afternoon of the 7th of Febru-

57 ary, after banking hours, when it was handed to me in my office, by Geo. M. Bacon—S. C. Hughes was then present—and taken by me for the Quebec Bank of Toronto. During the conversation the draft and bills of lading for barley, which we held for the Quebec Bank of Toronto, were mentioned, and upon being informed by Bacon & Co. that they could do nothing more towards payment than give this note, I replied that we must hand the barley over to Perin & Gould for sale as instructed, for the balance. Upon being informed by them, Bacon & Co., that they had already obtained the barley and sold it, I was surprised and said I believed they had laid themselves liable to the State's prison for obtaining goods under false pretence. I took it for the Quebec Bank of Toronto, and they are the present owners of it. I handed it to the president the same evening (Feb'y 7th). It was not out of the possession of the Merchant's National Bank until handed to the attorneys for suit at the direction of the bank.

Ques. 6. I call your attention to a memorandum, which reads as follows: "(Stamp) Weyand and Jung, $5,000, February 7th, 60 d's, $2.50 collect of George M. Bacon & Co," a copy of which is in your deposition given in a case before Judge Yaple in the superior court of Cincinnati.

58 Now state if you recollect such memorandum; and, if so, who made it?

Ans. The memorandum refer'ed to is in my handwriting, and was made by me, and marked "Exhibit No. 1," and so marked in my evidence in the printed record.

Ques. 7. Please state when that memorandum was made and what was the occasion of it.

Ans. The memorandum was made on the morning of the 8th of February, 1870, and was for a stamp placed on the note in question made at the direction of the president, Mr. Fallis. I made the memorandum to put in the stamp-box in place of a stamp taken out and not paid for. The stamp-box is a part of petty-cash drawer, and when, for instance, we buy $100 of stamps, the clerk must have the stamps, the money for the stamps, or a memorandum showing what the stamps were used for. I took the stamp out of the box when I placed the memorandum in.

Ques. 8. Please state whether you had any conversation with Bacon and Hughes, or either of them, after the 7th of February.

59 Ans. I had no conversation with either Bacon or Hughes after the 7th of February.

Ques. 9. State if any objection was made by Hughes or Bacon to giving the note in suit to you for the Quebec Bank. If so, state when and where.

A. Neither Bacon or Hughes made any objection whatever to our taking the note in question for the Quebec Bank as a part payment on a past-due acceptance of Geo. M. Bacon & Co. belonging to that bank.

Ques. 10. Please state if you ever had any conversation with S. C. Hughes, in the presence of Bacon, in which you said we will just take this note, and Mr. Hughes said it will do you no good, we have made an assignment.

Ans. I never had any such conversation with S. C. Hughes, either on the 7th of February or any other time. I never saw them after they had made an assignment, and never had any conversation with them about the assignment at any time.

Ques. 11. State if you ever sent or went to Bacon's office and

60 left a message that you wanted to see them with Mr. Weiszmann, or any one else in the office; and, if so, what was the occasion of your visit?

Ans. I was at their office, on the afternoon of the 5th of February, and left a message with Mr. Weiszmann saying I wished to see Geo. M. Bacon & Co. The occasion of the visit was the receipt of a letter from the Quebec Bank, dated February 2d, 1870, which read, "Please hand barley to Perrin & Gould for sale, giving Bacon & Co. notice." I went down to their office to give them notice, having received the letter on the 5th of February. This was on Saturday, some time between 2 and 4 o'clock. They were not in, but I saw Mr. Weiszmann, whom I knew, and who was connected with their office. This was at Water street. I asked if George M. Bacon were in. He replied that they were not. I then requested

him to tell them I wished to see them. I was at the bank all the remainder of the day, and they did not come up that day.

Ques. 12. Please state whether you saw Mr. Weiszmann at any other times during that month of February.

A. I did not have any conversation with him, and do not recollect seeing him.

61 Ques. 13. Please state whether or no you had any conversation with Bacon or Hughes in relation to this note on the 9th of February.

Ans. I had no conversation with them on the 9th of February. I did not see them on that day.

Ques. 14. After you handed the note to Mr. Fallis on the evening of the 7th of February, who had the custody of the note, and where was it kept?

Ans. Mr. Fallis had the custody of the note, and it was kept in his desk, where it remained for several days, until after it was endorsed by John Hughes, and handed to me on either the evening of the 10th or on the morning of the 11th of Feb'y.

Ques. 15. Were you acquainted with Daniel Jung?

Ans. I was not. I never saw him.

Ques. 16. Please state whether you had before received bills of lading on barley for George M. Bacon & Co., with drafts attached; whether you held those bills of lading until after the drafts were paid, and if you notified the agent of the carriers in relation to it.

62 Ans. We had frequently before received drafts on George M. Bacon & Co., with bills of lading attached, for this bank, which bills of lading were only delivered upon payment of the drafts, and we had notified the agent of Hamilton & Dayton R. R., over which the barley was shipped, not to deliver the goods until the bill of lading was presented. I went out to see the agent myself and gave him the instructions.

Ques. 17. Did George M. Bacon & Co. know that you held for the bank a bill of lading for barley to cover the draf's? Also state if you know how they obtained the barley.

Ans. They did know that we held a bill of lading, for they accepted the draft with the bill of lading attached, and by some error the barley came by canal to Brighton Station. Bacon found it out, obtained the barley without the bill of lading and without notif'ing us, and sold it.

Ques. 18. When did you inform Mr. Fallis that the barley had got into the possession of Bacon & Co.?

Ans. As soon as I learned the fact from Bacon & Co., on evening of the 7th of February, and in the presence of Bacon & Co. I stood

63 there talking to them when Mr. Fallis came into my office.

H. C. YERGASON.

FEB'Y 1ST, 1879.

Adjourned till Monday, the 3d February.

J. H. WOODWARD,
*Notary Public.*

FEBRUARY 3D, '79.

Adjourned by consent till February 4th, 1879.

FEBRUARY 4TH, 1879.

Met pursuant to adjournment.

Present: J. R. Murdoch, counsel for plaintiff, and J. F. Follett, esq., on behalf of defendants, when the cross-examination of D. J. Fallis was commenced.

J. H. WOODWARD, *N. P.*

Cross-examination of D. J. Fallis conducted by Mr. FOLLETT:

X Ques. 1. At the time you received the $5,000 note in controversy in this case what other securities or evidence of indebtedness did your bank, on behalf of plaintiff, hold against George M. Bacon & Co.?

Ans. I think we held George M. Bacon & Co.'s note with John Hughes' endorsement.

64 X Ques. 2. Is the note a copy of which is as follows—

[3.25 U. S. rev. stamp, cancel.]

CINCINNATI, *Dec.* 23*d*, 1869.

Forty-five days after date we promise to pay to the order of Thos. Clarkson & Co. sixty-six hundred and sixteen $\frac{35}{000}$ dollars in gold, at Merchants' National Bank. Value received.

$6,616.35.]

Due

GEO. M. BACON & CO.

(Endorsed:) Without recourse.

THOMAS CLARKSON & CO.
JOHN HUGHES.

—the note to which you refer?

Ans. Yes, sir.

X Ques. 3. Did not your bank at that time hold on behalf of the plaintiff a draft in the sum of $6,502.56, payable in gold 25 days after date, and dated Toronto, November 10th, 1869, drawn by Thomas Clarkson & Co. upon Geo. M. Bacon & Co., Cincinnati, Ohio, and endorsed by Thomas Clarkson & Co., and accepted by Geo. M. Bacon & Co., together with a bill of lading accompanying said draft for 13,000 bushels of barley; and did not your bank continue to hold said draft and bill of lading until the same were turned over to the attorneys of the plaintiff in this case by you?

65 Ans. The facts referred to in the question did exist, I think, with this qualification, however, the previous obligation to that of the note endorsed by Hughes were held as memorandums by our bank simply that all of this business might be traced, with the understanding that when the $6,616.35 was paid that all these previous papers should be given up with that obligation. But when we ascertained that George M. Bacon & Co. had obtained possession of the barley then we consented to take the $5,000 note sued on and give credit for proceeds on note on which John Hughes was endorsed.

X Ques. 4. When did you ascertain that George M. Bacon & Co., had got possession of the barley?

Ans. On the afternoon of the 7th of February, 1870.

X Ques. 5. Is it not true that the note for $6,616.35 had been executed

and forwarded to the Quebec Bank of Toronto for the purpose of taking up and relieving the draft for $6,502.56?

Ans. I do not remember now the language of the letter of our correspondent, but this much I do remember, that we wished to hold on to all the papers in this case until finally settled, and were permitted to
66 do so until the time of taking the $5,000 note, by consent of parties in interest in order to trace this business, which without all the papers might become complicated.

X Ques. 6. Do you not know that after the note for $6,616.35 had been forwarded to the plaintiff the plaintiff declined to receive the same, and returned it to your bank without the endorsement of Thomas Clarkson & Co., and with instructions to deliver the acceptance and barley or the bill of lading for the same to George M. Bacon & Co., when they should deliver to you a note properly executed and endorsed?

Ans. I knew but little of this case until the afternoon of February 7th, 1870; previously to that period it had been in the hands for collection, whose duty it was to attend to that class of business, composed of cashier or assistant cashier and collection register, and my attention had not been especially called to this matter till Bacon presented the $5,000 note. The letters connected with this business will show, to which I paid no attention since the case was commenced in the superior court of this city.

67 X Ques. 7. Do you remember whether or not, after the maturity of the draft for $6,502.56, you received instructions from the plaintiff to hold over without protest said draft for fifteen days?

Ans. I do not.

X Ques. 8. If I understand you correctly, the agreement with Bacon was that the $5,000 note in controversy in this case would be discounted by you on behalf of the Quebec Bank of Toronto, the proceeds to be applied in payment of the note for $6,616.35, endorsed by John Hughes; am I right?

Ans. Yes.

X Ques. 9. Was the note referred to for $6,616.35 then due?

Ans. I do not remember.

X Ques. 10. Do you know whether or not said note had at that time been endorsed by Thomas Clarkson & Co.?

Ans. I do not remember.

X Ques. 10. Do you know at whose instance said note was protested?

68 Ans. I have no distinct recollection.

X Ques. 11. Was there ever any agreement as to the amount of credit that should be given for the $5,000 note; and, if not, why not?

Ans. On the 8th of February, 1870, George M. Bacon promised to bring money to pay certain overdrafts and stamp; left the bank as he alleged for that purpose, to get the money, and returned immediately for the purpose of converting the proceeds of said $5,000 note into its value in gold, and having credit entered on his note with John Hughes' endorsement, but he failed to return and do other things as promised, and hence give us no opportunity to do as agreed.

X Ques. 12. Do you not know that the plaintiff under date of a letter Feb'y 2d, 1870, wrote a letter to the cashier of your bank instructing

him to demand payment from Mess. G. M. Bacon & Co., of their acceptance for $6,502.56 gold due 8th Dec., 1869, with interest at 8 per cent. per annum, and if not paid, to hand the barley to Mess. Perin & Gould for sale, giving Messrs. Bacon & Co. legal notice if such was required, and had not such letter been received by your bank prior to the 7th day of February, 1870?

69 Ans. I have not charged my mind during the long period which has elapsed since my previous testimony was given; neither have I tried to remember what was contained in letters, supposing that they would be better evidence as written facts than my memory; consequently I do not remember distinctly.

X Ques. 13. Is it not true that Mr. H. C. Yergason, the cashier of your bank, attended principally to the correspondence with the plaintiff with reference to this matter, and that you gave very little attention to the same?

Ans. It is the duty of the cashier and assistant cashier to attend to the correspondence generally, but when there are any difficulties arise I am usually consulted, and was in this case.

X Ques. 12. When were you first consulted by them with reference to this case?

Ans. I think the consultation with me commenced in December, 1869.

X Ques. 13. Did they not then advise you of the contents of the

70 letters received from the plaintiff, and of plaintiff's instructions in reference to this matter?

Ans. I think they did.

X Ques. 14. When did you first see Mr. George M. Bacon in relation to the 5,000$ note in controversy in this case?

Ans. I think it was on the 7th of February, 1870.

X Ques. 15. How many times did you see him on that day?

Ans. I think twice or three times.

X Ques. 16. At what time in the day were each of those interviews?

Ans. Twice in the afternoon, and I am not certain that I saw him in the forenoon of the same day, but I think I did.

X Ques. 17. Where did you see him at each of these interviews?

Ans. Once in the cashier's room, again in the afternoon, either in the cashier's room or in the hall between his room and mine; these

71 were the only interviews I had with him on that day; but I have a vague impression that I saw him on the morning of the same day, when he left the 5,000$ note referred to.

X Ques. 18. Were you not examined as a witness on the trial of the case of the Quebec Bank of Toronto vs. Weyand & Jung, No. 26050 of the superior court of Cincinnati, at the December term, 1872; and did you not then state that you did not see Mr. Bacon when he came in in the morning?

Ans. I did testify on that trial, and I may have said that I did not see Mr. Bacon in the morning, and if I then said so, which I have no recollection of saying, it was correct, and my distant and vague impression of having seen him is incorrect; but in regard to the two other interviews in the afternoon of the same day, I remember distinctly.

X Ques. 19. Do you know Sandford C. Hughes, then the partner of Geo. M. Bacon?

Ans. I do not.

X Ques. 19. Was anybody present at either of the interviews you testify to but Mr. Bacon, Mr. Yergason, and yourself?

72 Ans. No, sir.

X Ques. 20. What time in the day did the last of these interviews occur?

Ans. Quite late in the afternoon, the precise minute not remembered.

X Ques. 21. Do you know whether or not Sandford C. Hughes was in your bank on that day?

Ans. I do not know.

X Ques. 22. What did you know at that time of the financial standing of Weyand & Jung?

Ans. I knew but little, positively; but their reputation as business men was fair. We had discounted their paper previously for George M. Bacon & Co., which had been paid. They enjoyed a fair amount of credit in financial circles at that time.

X Ques. 23. Do you know why it was your discount committee declined to discount said $5,000 note?

73 Ans. I do know; it was that we were losing confidence in Geo. M. Bacon & Co. as customers, and at that season of the year we had not the money to spare from our good customers to do this comparatively outside and single name paper.

X Ques. 24. Was there ever, in fact, any credit given to George M. Bacon & Co. for this $5,000 note?

Ans. He, George M. Bacon, never having returned, as he promised, the figures were not made, but the note had been left for that purpose, and positively received and retained on that account.

X Ques. 25. By whose directions were legal proceedings instituted for the purpose of collecting the claim of the plaintiff against Geo. M. Bacon & Co.?

Ans. By the owner of the collection, the Quebec Bank of Toronto.

X Ques. 26. Was it not left by the plaintiff to you to determine what legal steps should be taken for the purpose of collecting said claim?

Ans. I do not remember if any such direction was given to us by the plaintiff.

74 X Ques. 27. Is it not true that suit was commenced about the same time upon the $5,000 note in controversy in this case, and upon the $6,616.35 note endorsed by John Hughes?

Ans. I don't remember, but I suppose the record will show.

X Ques. 28. Do you know by whom said notes were handed to the attorneys who commenced proceedings upon them, or who directed that they should be handed to them?

Ans. I think it was by directions of the plaintiff, but I do not remember by whose hand it was given to the attorneys, but I presume by our cashier.

X Ques. 29. Do you know whether or not the $6,616.35 note has been out of the possession of your bank at any time since its maturity prior to the time it was placed in the hands of the attorneys for collection? If so, state when and for what purpose.

Ans. I do not remember the particulars in this connection, but I presume the correspondence will show.

X Ques. 30. Was not said note sent by your bank to the plaintiff

75 enclosed in a letter dated Feb'y 11th, 1870, for the purpose of getting the endorsement of Thomas Clarkson & Co.?

Ans. I do not remember the particulars, but if the letter shows such to have been the case it was with my knowledge; but what at that time was written as in my transactions generally I don't try to remember.

X Ques. 31. Do you remember whether or not the endorsement of Thomas Clarkson & Co. was on said note at the time it was protested?

Ans. I do not.

X Ques. 32. Did you not testify in a deposition which you gave in the suit which was instituted by the plaintiff against Weyand & Jung and others in the superior court of Cincinnati upon the $5,000 note in controversy in this case that the name of Thomas Clarkson & Co. was not endorsed on the back of said note until after the 11th of February, 1870?

Ans. I do not remember the particulars of my testimony at that time, and have not examined the papers containing the facts since. I therefore have no distinct recollection of the matter enquired about.

76 X Ques. 33. Did you not in the same deposition, in answer to the following question, state whether or not you or the Merchants' National Bank were not instructed on the 2d of February, 1870, to demand payment of George M. Bacon & Co. of the $6,502.56 gold draft, with 8 per cent. interest, answer as follows: "We were requested to demand payment of the said draft under date Feb'y 2d, 1870, received Feb'y 5th, 1870, and we did obey orders by demanding payment," etc.?

Ans. If I did testify on the occasion named the circumstances stated as facts were so. I had put myself to considerable trouble at that time to examine the necessary documents, and now after the lapse of nearly nine years, during which time I have examined no original papers, and cannot with *with* precision state that which is already a matter of record, particularly when until very recently I was not aware that I should ever be called upon to testify in this case. The letters, however, about this time, on file, will shown.

X Ques. 34. Was there any stamp on said $5,000 note when you first saw it?

Ans. No, sir.

77 X Ques. 35. Was any stamp put on said note to your knowledge?

Ans. Yes, sir.

X Ques. 36. When, and by whom?

Ans. It was pinned to the note on the morning of 8th February, 1870, and a ticket placed in the stamp-box as a memorandum, which Bacon at that time, together with the overdraft, said he would go down and get the money and pay. Whether this stamp was applied to the note by Bacon himself, or by the cashier, or myself, I am not certain; but it was done at Bacon's request, and with his promise to pay, and which he never came back to perform.

X Ques. 37. Was not the first testimony which you gave with reference to the matters in controversy in this case given in the form of a deposition in the month of June, 1871?

Ans. I have not examined the precise day, but it was about that time and in the form of a deposition.

X Ques. 38. In that deposition was not the 42' cross-question

78 asked you as follows: "Who put the $2.50 rev. stamp on the Weyand & Jung note? State whether or not said stamp is cancelled," and was not your answer to said question as follows: "I do not know who put it on; I do not perceive any cancellation;" and was not the 43' cross-question as follows: "State whether or not the stamp was on the note before the commencement of this suit," and your answer to said question as follows: "It was placed on the note either on the day or before we received it for the Quebec Bank?" And was not the 44th cross-question as follows: "By whom was it placed on the note?" and your answer to said question as follows: "I cannot tell, but I know it was on when I received it as above?"

Ans. In answer to the details of the 42d question in my former testimony I did not know then, nor do I know now, by whose hands the stamp was put on; but I do know that George M. Bacon promised to pay for it, and apparently left the bank for the purpose of getting the money to pay for that and other matters promised. In regard to the 43d cross-question mentioned, my answer is that it was on, or it was attached to, said note either on the 7th or 8th day of February, 1870; it was not can-
79 celled to the best of my recollection, because Bacon did not return as promised; consequently he did not cancel the stamp.

Redirect examination conducted by Mr. MURDOCH, counsel for pl't'fs:

1. R. E. You have been asked about the presence of S. C. Hughes with George M. Bacon at Mr. Yergason's office on the afternoon of Feb'y 7th, 1870; now state if you know Mr. Hughes; if you had ever been introduced to him, or had him pointed out to you?

Ans. I have no recollection of ever having seen or having *been* in any way pointed out to me; he may have been at the counter; but Mr. Bacon generally did the business of the firm.

2. R. E. Is Mr. Yergason's office a public place for customers of the bank, or is it retired, and is it such a place as numbers of persons are accustomed to go on business?

Ans. It is rather a retired place when compared to the receiver and paying teller's desk, but almost all customers visit the cashier's room, except those who merely want to deposite and draw money; even dis-
80 counts are frequently and generally left with the cashier previously to the hour of discount.

3. R. E. On the occasion of the interview in question with Geo. M. Bacon and Mr. Yergason, did you or did you not observe any one unknown to you about the bank, either in Mr. Yergason's room or the hall near it? And if so, state, as near as you can, who they were like, and if they had any connection with the business then discussed.

Ans. I have no recollection of seeing any one except the two named, and believe there was no other near. I did not notice anybody in the hall or within hearing, and believe there was none.

D. J. FALLIS.

FEB'Y 4TH, 1879.

The further taking of these depositions was, by consent, adjourned until Feb'y 5th, at 2 p. m.

J. H. WOODWARD,
*Notary Public.*

FEB'Y 5TH, 1879.

Met pursuant to adjournment; and the cross-examination of H. C. Yergason was commenced by J. F. FOLLETT, Esq., counsel for defendants.—J. H. WOODWARD, *N. P.*

81 X Ques. 1. What was the transaction between the Quebec Bank of Toronto, plaintiff, and Geo. M. Bacon & Co., out of which the controversy in this case arises? Please state its origin, what securities or evidences of indebtedness your bank a tany time held as the agent of plaintiff relating to said indebtedness?

Ans. We received for collection from the Quebec Bank of Toronto, of which the following is a copy:

$6,502.56.] [No. B. R. 70.

TORONTO, *Nov. 10th*, 1869.

Twenty-five days after date pay to the order of ourselves sixty-five hundred and two $\frac{56}{100}$ dollars in gold. Value received.

THOMAS CLARKSON & CO.

To G. M. BACON & Co.,
*Cincinnati, Ohio.*

(Endorsed on back:)
Pay Quebec Bank, Toronto, or order.

THOMAS CLARKSON & CO.

Pay the Merchants' National Bank, Cincinnati, or order, in collection account.

QUEBEC BANK,
R. H. BETHUNE, *Man'r.*

82 Attached to which was a bill of lading for 15,000 bushels of barley. This draft was accepted by Geo. M. Bacon & Co. upon receipt; before maturity it was extended 15 days upon instructions of the Quebec bank; that was on December 8th, the day it matured. On the 23d of December we received a second telegram further waiving protest; also requesting us to hold over, "I will write instructions." We received from the Quebec Bank of Toronto a note, of which the following is a copy:

[3.25 U. S. rev. stamp canceled.]

CINCINNATI, *Dec. 23d*, 1869.

Forty-five days after date we promise to pay to the order of Thos. Clarkson & Co. sixty-six hundred and sixteen $\frac{35}{100}$ dollars in gold at Merchants' National Bank. Value received.

$6,616.35.]
Due .

GEO. M. BACON & CO.

(Endorsed:) Without recourse.

THOMAS CLARKSON & CO.
JOHN HUGHES.

Which note we understood was to take the place of the 6,502.56$ note, gold, when endorsed to the satisfaction of the Quebec bank.

X Ques. 2. Will you state whether the draft and bill of lading to which you refer and the note for 6,616.35$ are the same as those now exhibited to you and marked by the notary public Exhibit "A," "B," & "C?"

83 Ans. They are.

X Ques. 3. Was the endorsement of Thomas Clarkson & Co. on said note, Exhibit C, when it was first sent to you by the plaintiff, or when was it put on, if you know?

Ans. I think the endorsement of Thomas Clarkson & Co. was not on previous to the 11th of February, 1870.

X Ques. 4. Who attended to the correspondence with the plaintiff on behalf of your bank in relation to the matters pertaining to the indebtedness of Geo. M. Bacon & Co., of which you have spoken?

Ans. I attended to it.

X Ques. 5. You have already referred to the telegrams from the plaintiff in which plaintiff directs an extension of time for the payment of the original draft, Exhibit A, in the last of which telegrams R. H. Bethune, manager of plaintiffs, says he will write you instructions. Do you remember whether he did write such instructions; have *for* the letter?

Ans. I do not remember whether he wrote instructions, and have not the letter.

84 X Ques. 6. Do you know why it was that the note marked "Exhibit C" was sent to you by plaintiff?

Ans. The note was sent to us enclosed in a letter from the Quebec Bank of Toronto, of date January 10th, 1870, of which the following is a copy:

QUEBEC BANK, *Toronto, 10th Jan'y*, 1870.

H. C. YERGASON, Esq.,
*Cashier Merchants' National Bank, Cincinnati:*

DEAR SIR: Mess. G. M. Bacon & Co. promised to arrange that overdue acceptance in *four* hands by sending me a prom' note for the amount and interest at 45 days, endorsed by two or three wealthy firms in Cincinnati, upon receiving which, and names being approved of, I and the drawers agreed to give them up the barley now held against overdue acceptance. Instead of this they have sent the enclosed note, G. M. Bacon & Co. to order of T. Clarkson & Co., endorsed by John Hughes, 45 days, 23d Dec., $6,616.35 gold. I have written to Messrs. Bacon & Co. to-day requesting them to call upon you with a new note properly drawn
85 with another endorser besides Hughes. Would you kindly forward the note they give you with your report?

Report of endorsers to me, and after I get the endorsement of T. Clarkson & Co. who are drawers of the overdue acceptance, I will if names are approved of authorize you to give up the barley now held and the old draft.

Apoligizing for giving you so much trouble,
I am, yours, respectfully,

R. H. BETHUNE, *Manager.*

The letter speaks for itself.

X Ques. 7. Did you not also receive a letter from the plaintiff, of which the following is a copy?

QUEBEC BANK, *Toronto, 2nd February*, 1870.

H. C. YERGASON, Esq.,
*Cashier Merchants' National Bank, Cincinnati:*

DEAR SIR: I wrote you last on the and have since received you' letter of the 29th ult. Please demand payment from Mes'rs. G. M. Bacon & Co. of their acceptance for $6,502.56 gold, due 8th Dec. last,
86 with interest at 8 per cent. per annum. If not paid pleas' hand the barley to Mes'rs. Perin and Gould for sale, giving Mes'rs. Bacon & Co. legal notice, if such is required.

I am, dear sir, yours, truly,

R. H. BETHUNE, *Manager.*

15,000 bus. schr. Seniete & Past.
(Postscript relating to another matter not copied.)

Ans. I did receive such a letter on the 5th of Feb'y, 1870.

X Ques. 8. What, if anything, did you do in pursuance of instructions contained in letter of date February 2d, 1870?

Ans. Upon receipt of the above letter I called at the office of Geo. M. Bacon & Co.; saw Mr. Weiszmann, and asked if Geo. M. Bacon & Co. were in. Was informed by him they were not in. I then requested him to say to them that I wished to see them.

X Ques. 9. Did you see either of the members of the firm of Geo. M. Bacon & Co.; if so, when, and what occurred?

Ans. I saw Geo. M. Bacon of that firm on the morning of the 7th; he came to my office and left for discount a not' of which the follow-
87 ing is a copy:

CINCINNATI, *Feb'y* 7, 1870.

[2.50 U. S. rev. stamp.]

Sixty days after date we promise to pay to the order of Geo. M. Bacon & Co. five thousand dollars, at Merchants' National Bank. Value received.

P. WEYAND.
D. JUNG.

(Endorsed:)

GEO. M. BACON & CO.
JOHN HUGHES.

The endorsement of John Hughes was not on at that time. The note was not discounted by our board.

X Ques. 10. Was that all that was said or done at that interview, simply the leaving of said note for discount?

Ans. It was.

X Ques. 11. When did you next see either of the members of said firm of Geo. M. Bacon & Co.? Who did you see and what occurred at that interview?

Ans. I saw both members of the firm of Geo. M. Bacon & Co. late in the afternoon of the same day when they came into my office and left the note above referred to and upon my saying if they could do nothing more towards paying their past due acceptance we would be obliged to hand the barley over to Perin & Gould for sale, as per instructions.

88 They then informed me that they had already obtained the barley and sold it. I was astonished and so said to them, and told them in my opinion they had laid themselves open to the State's prison for obtaining goods under false pretences.

X Ques. 12. About what time in the day did this last interview occur, and who was present?

Ans. About 4 o'clock, as near as I can recollect; Geo. M. Bacon, S. C. Hughes, and myself were present.

X Ques. 13. Was said $5,000 note of Weyand and Jung produced at that interview; and, if so, by whom, and what was said or done in relation to said note?

Ans. The note was produced at that interview and handed to me by Geo. M. Bacon, and left as a part payment on the past due acceptance of Bacon & Co. above referred to. The conversation stated above.

X Ques. 14. Was anything said about their having obtained the barley prior to the time that you got possession of said $5,000 note?

89 Ans. I was in possession of the note before they informed me they had got possession of the barley.

X Ques. 15. Who handed you the note, and what was said at the time it was handed to you?

Ans. Geo. M. Bacon handed me the note; I do not remember the exact conversation, but the understanding was that we were to take the note for the Quebec Bank as part payment on the past-due acceptance, as previously stated.

X Ques. 16. Prior to the time you got possession of said note had anything been said by you to either of the members of the firm of Geo. M. Bacon & Co. in relation to the instructions in plaintiff's letter to you of February 2d, 1870?

Ans. I can't remember; I might have said to them that I had instructions to turn the barley over to Perin & Gould on the morning of the same day.

X Ques. 17. If you did so say to them or either of them, can you remember of any reply that was made to you?

Ans. I do not remember any reply.

90 X Ques. 18. Was anything said as to the amount of credit that should be given for said $5,000 note?

Ans. Not to me.

X Ques. 19. Was Mr. Fallis present at that interview?

Ans. Mr. Fallis was present part of the time.

X Ques. 20. Where in the bank did the interview occur?

Ans. In my office.

X Ques. 21. Where both Bacon & Hughes present all the time?

Ans. Bacon & Hughes came in together, but whether they both remained until I called Mr. Fallis' attention to the fact that they had obtained the barley and sold it, I do not remember; I know Mr. Bacon did.

X Ques. 22. Do you not remember that Bacon & Hughes went away together?

Ans. I do not.

X Ques. 23. Was any receipt given to Bacon or Hughes for said
91 note, or was there any credit given for the same?

A. No receipt was given by me, and no credit made.

X Ques. 24. Was the 6,616.35 gold note then due by its terms?

Ans. The note of Geo. M. Bacon & Co., for $6,616.35 gold, was due on the 9th of February.

X Ques. 25. Do you know by whose order said note was protested?

Ans. It was probably handed to the notary by myself.

X Ques. 26. Did you receive any instructions from the plaintiff to have said note protested?

Ans. We probably did not receive any direct instructions to have the note protested, as it is understood between banks that all paper is to be protested unless positive instruction to the contrary accompany*ing* the paper.

X Ques. 27. Had you prior to that time received any communication from the plaintiff with reference to said note other than the letter
92 of January 10, 1870, a copy of which has been heretofore given in you' deposition?

Ans. I do not remember any other instructions.

X Ques. 28. Did you at any time have any conversation with Bacon or Hughes with reference to stamping said note?

Ans. I do not remember any.

X Ques. 29. Did you see either Bacon or Hughes, or have any conversation with either of them with reference to said 5,000 $ note subsequent to the interview in your office of which you have spoken?

Ans. I may have seen them, but had no conversation with either of them in regard to it.

X Ques. 30. Did you retain possession of the 6,502.56 gold draft and bill of lading accompanying it?

Ans. We did.

X Ques. 31. You held them, did you not, said draft and bills of lading, the $6,616.35 gold not' dated February 23d, 1869, and neither of them credited with any payment made thereon, after you got possession of the $5,000 note in controversy?

93 Ans. We did hold them, but a payment of the proceeds of the 5,000$ note in controversy converted into gold, or the proceeds of the note when paid converted into gold, would have appeared as an endorsement or part payment on the $6,502.56 gold acceptance, if the note had been paid at maturity or Mr. Bacon had called and arranged for the proceeds, as I understand he was to do.

X Ques. 32. Do you know by whose direction legal proceedings were instituted for the collection of the claim of plaintiff arising upon said gold drafts?

Ans. I do not now remember; the instructions must have come from the Quebec Bank.

X Ques. 33. Do you not know that suit was originally brought by the Quebec Bank upon the said note for $6,616.35, payable in gold, and also upon the note in controversy in this case at about the same time?

Ans. I do not.

X Ques. 34. Who handed to the attorney for collection the notes upon which suits were brought?

94 Ans. I do not now remember.

X Ques. 35. Did you write to the plaintiff a letter, dated February 11, 1870, and did you receive an answer thereto—a letter from the plaintiff, dated Feb'y 15, 1870, enclosing two letters, one from Thomas Clarkson & Co. to Messrs. Reynolds, Whiting & Bangs, Toledo, dated Nov. 10, 1869, and the other from plaintiff to same parties, Feb'y 15th, 1870? If so, please give in your answer copies of said letters.

Ans. We did write and receive said letters, and the following are copies:

FEBRUARY 11, 1'.

R. H. BETHUNE,
*Manager of Quebec Bank of Toronto:*

DEAR SIR: Your favour of the 2d inst. duly rec'd. As you requested, I demanded payment of Bacon & Co. They informed me that they could not pay, and that they already had received the barley and sold it. Since then they have made an assignment (10 inst.), but we hope we have secured your claim. We still hold the B. L. attached to draft $6,502.56, gold due Dec. 8, 15,000 bushels barley shipped to your order at Brighton
95 Station, care Reynolds, Whitney & Bangs, Toledo, Ohio. The Toledo firm forwarded, via canal instead of rail, and thus enabled Bacon & Co. to obtain possession of it. The error was in your taking a B. L. care of W. & B., Toledo, O. I enclose protest with Bacon & Co., $6,616.35, gold, rec'd, in your favour of the 10' of January, for the endorsement of T. Clarkson & Co., after which please return to us. We have obtained note of Weyand & Jung, $5,000, 7th Feb'y, 60 days, endorsed by Hughes, which can be sold here, if you desire. We think there will be no loss, but it will take a little time for Mr. Hughes to arrange matters so that he can pay.

Very truly, yours,

H. C. YERGASON, *Cashier.*

QUEBEC BANK, TORONTO,
*Feb'y 15th*, 1870.

H. C. YERGASON,
*Cash'r Merchants' National Bank, Cincinnati, Ohio:*

DEAR SIR: I wrote you last on the , and have since received your letter of the 11th inst. I return Bacon's note for $6,616.35, gold, endorsed by Hughes and Clarkson; latter without recourse. Please do your
96 best to collect this from Hughes. If he wants time, he ought to give security. If he sells his real estate without giving security, are we sure of getting proceeds? Please give me your opinion of the standing of Weyand & Jung, whose note you have for $5,000, and say what it could be sold for; if a good note I would just as soon hold it, as we have plenty of money this winter. Is it gold or currency? I enclose Messrs. Clarkson's letter to Messrs. Reynolds, Whiting & Bangs, Toledo, instructing them to ship on the barley to order of Quebec Bank, Brighton Station. As they have never received any other instructions, surely they or the owners of the canal boat are liable. I also enclose a copy of my letter to Reynolds, Whiting & Bangs, of to-day's date. Please advise me what is best to be done

next, and take any legal steps you may deem necessary at our expense. We ought to have undoubted security for the bill due 8th December, $6,502.56, gold, and legal interest.

I am yours, respectfully,

R. H. BETHUNE, *Manager.*

P. S.—I don't want to come on Clarkson, drawer of draft here, if it can be avoided.

R. H. B.

97 TORONTO, *Nov.* 10*th*, 1869.

Messrs. REYNOLDS, WHITING & BANGS, *Toledo:*

DEAR SIRS: Enclosed we beg to hand you for consignee's cert. of 15,000 bush. barley, consigned per sch'r Smith & Post to the order of the Quebec Bank, at Brighton station, care of your house. You will please forward it to this address. Yours of the 4th inst. came duly to hand, and we note shortage in Sea Gull cargo, and cannot account for it in any way. Barley dull at 60 cents aboard to-day; receipts light.

Yours, truly,

(Signed) THOS. CLARKSON & CO.

[Enclosure.]

QUEBEC BANK,
*Toronto, Feb'y* 15*th*, 1870.

REYNOLDS, WHITING & BANGS, *Toledo:*

DEAR SIRS: I wrote to you last on the , and have since received your letter. I enclose copy of letter to you from Thos. Clarkson & Co., of this city, instructing you to forward barley ex Smith & Post to our order, Brighton station, Cincinnati. It appears that this barley has been delivered to Mess. Bacon & Co., Cincinnati, without any order from us or our agents, the Merchants' National Bank. As we may not
98 have sufficient security for our claim on this barley, will you please press the owners of the canal boat to deposit security with the Merchants' National Bank, Cincinnati; otherwise we must take proceedings against them. I enclose a copy of the bill of lading of Smith & Post.

I am yours, respectfully,

(Signed) R. H. BETHUNE, *Manager.*

X Ques. 36. Do you know whether or not the plaintiff still remains the owner of the claim which was originally a claim against Geo. M. Bacon & Co.?

Ans. So far as I know, they are owners of the claim.

Re-examination:

1. R. E. At the time of the interview between Hughes, Bacon, and yourself, in your office, you say that Bacon remained until Mr. Fallis was notified of their having obtained the barley; that you don't remember whether Hughes remained until that time. Now, state where Mr. Hughes was during that interview, and if you noticed him in any other part of
99 the bank, or if you know whether he waited for Mr. Bacon to come out.

Ans. I remember that Mr. Bacon was present after I had informed Mr. Fallis that they had obtained the barley, but do not remember whether Mr. Hughes had gone out or not. Did not see him in any other part of the bank, and do not know whether he waited for Mr. Bacon or not.

2. R. E. How far from the street is your office above referred to? And state if there are any ante-rooms or passages where customers or visitors are accustomed to wait.

Ans. My office is a small room back of the main room, about 100 feet from the street, I think. There is a passage-way between my office and the outside door of the main room of about 60 feet, not enclosed, but a part of the main banking-room, separated by a railing and desks, and a vestibule between that door and the street, with a directors' room and a small room on one side. The vestibule is about 30 feet long.

H. C. YERGASON.

100 THE STATE OF OHIO,
*Hamilton County, ss:*

I, John H. Woodward, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named Daniel J. Fallis and H. C. Yergason were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed as above set forth were reduced to writing by myself in presence of the witnesses respectively, and were subscribed by the said witnesses respectively in my presence, and were continued from day to day as above set forth; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit, and that said depositions were taken at the time and place specified in the notice hereto attached, and in accordance with the order of court heretofore made herein.

In testimony whereof I have hereunto set my hand and official seal this sixth day of February, A. D. 1879.

JOHN H. WOODWARD,
*Notary Public.*

101 Deposition of sundry witnesses taken before me, J. H. Kelley, a notary public within and for the county of Hamilton, in the State of Ohio, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the defendants in an action pending in the circuit court of the United States for the southern district of Ohio, in which the Quebec Bank of Toronto is plaintiff and Weyand and Jung are defendants. J. R. Murdoch being present on behalf of plaintiff, and John F. Follett on behalf of defendants.

EXHIBIT B.

FREDERICK WEISZMANN, of lawful age, being by me first duly sworn, deposes and saith as follows:

1. Question by JOHN F. FOLLETT, attorney for defendant. Please state your age and place of residence.

Ans. Age, 44; # 113 Fourteenth st., Cincinnati.

Ques. 2. Are you acquainted with the members of the firm doing busi-

ness in the early part of the year 1870 under the firm-name of George M. Bacon & Co., and were you acquainted with Peter Weyand and Daniel Jung in their life-time?

Ans. Yes, to both questions.

102 Ques. 3. Who composed the firm of George M. Bacon & Co.?

Ans. George M. Bacon and Sanford C. Hughs.

Ques. 4. Were you in the employ of George M. Bacon & Co. while they were in business? If so, state when you commenced to work for them, and when you quit.

Ans. I was in their employ from the time the firm commenced, which I think was in 1868, up to the time they made the assignment, which I think was on February 9th, 1870.

Ques. 5. Did you see a note dated February 7th, 1870, purporting to have been executed by Weyand and Jung to George M. Bacon & Co., payable sixty days after date, and in the sum of five thousand dollars? State when, where, and under what circumstances you saw said note.

Ans. I did see said note, and had it in my possession early in the morning of the 9th of February, 1870. Mr. Sanford C. Hughs came to my house, handed me the note, and asked me to go to John Kauffman, to get his indorsement on it, as the Merchants' National Bank would not accept the note without an indorser. I went to Mr. Kauffman with the

103 note, and not finding him in, I returned the note to Mr. Hughes. I had the note in my possession for about two hours. I did not see it afterwards.

Ques. 6. State whether the note now exhibited to you is the note to which you refer in your last answer, and a copy of which note is set out in ques. No. 3 of the direct examination of George M. Bacon herein.

Ans. Yes, sir; that is the same note which Mr. Hughes gave me to get Mr. Kauffmann's endorsement.

Ques. 7. State whether or not, after you returned said note to Sandford C. Hughes, as you have stated, you saw Mr. H. C. Yergason, cashier of the Merchants' National Bank of Cincinnati; and if so, state when and where you saw him, and what occurred.

Ans. I did see Mr. Yergason after the return of the note, as I have already stated, at No. 5 Water street, George M. Bacon's place of business, a few minutes (say five or ten minutes) after three o'clock in the afternoon of the same day. He asked where Mr. Bacon or Mr. Hughes were; he wanted to see them. He told me to find them, and for them to

104 bring down the note; that he would fix it up for them. I went up to Douglass' office, at the corner of Walnut and Fourth, and saw Mr. Bacon and Mr. Hughes; told them what Yergason said to me. Mr. Bacon told me "All right;" got into the buggy with Mr. Hughes; told me to follow them to the Merchants' National, and they would let me know whether it would be forced upon or not; if Yergason took this note they wouldn't need to make an assignment. I followed them and saw them go in the Merchants' National; when they came out they made some remark to me, which I don't now remember. They drove off, and I went down to the office, and was surprised to see next morning that an assignment had been made.

Ques. 8. When you went to Douglass' office who did you see?

Ans. I called them out, and saw no one but Geo. M. Bacon and Sandford C. Hughes.

Ques. 9. What part of the business of Geo. M. Bacon & Co. did you do?

Ans. Selling and delivering the barley, Geo. M. Bacon & Co. being dealers in barley.

105 Ques. 10. State, if you know, what was the condition of Mr. Daniel Jung's health at the time the note was given, and by whom the note was signed.

Ans. He was sick and confined to his bed. The note was signed by Daniel Jung.

By the consent of the parties and their attorneys the further taking of these depositions is adjourned until Thursday, January 2nd, 1879.

T. H. KELLEY,
*Notary Public, Hamilton Co., O.*

Pursuant to the adjournment had herein on January 4th, 1879, the further taking of these depositions was resumed on Tuesday, January 7th, 1879, J. R. Murdoch, esq., being present on behalf of plaintiff, and John F. Follett, on behalf of defendants.

Cross-examination of Frederick Weiszmann by J. R. MURDOCH, Esq.:

X Ques. 1. Please state how long you were engaged in business with Geo. M. Bacon & Co.

Ans. I think from the fall of 1868 until the assignment.

106 X Ques. 2. During the time you were in business with them were or were they not in the habit of giving accommodation paper to Weyand & Jung and receiving similar accommodation paper from them?

Ans. Yes.

X Ques. 3. What do you know about this note in controversy, and simelar note made by George M. Bacon & Co. to Weyand & Jung, for the same amount at the same time, and discounted by Weyand & Jung at J. F. Larkin & Co.'s bank on the 7th of February, 1870?

Ans. This note was gotten to help them along, and I recognize it from the handwriting. Mr. Jung told me the day before the assignment was published that they had given Geo. M. Bacon & Co. this not' for accommodation to help them along, or something to that effect. About the other note of the same amount and date I know nothing from either of the parties.

X Ques. 4. Did Mr. Yergason come to your office about this matter during the month of February, 1870; and, if so, how many times?

107 Ans. He came once to the place of business of Geo. M. Bacon & Co., No. 5 Water street.

X Ques. 5. To your knowledge, did Mr. Yergason or the Merchants' National Bank send any messenger except Mr. Yergason himself to your office during said month of February?

Ans. Mr. Yergason came himself.

X Ques. 6. Please state whether you saw Mr. Hughes or Mr. Bacon on the 7th of February, 1870; and, if so, whether it was after seven o'clock in the morning of that day.

Ans. If I saw them at all it was after seven o'clock in the morning; I usually went to the office nearly every day; I don't think I was at the office on the 7th of February, as it is my birthday, and I usually celebrate it. If I was there at all it was only for a short time; I am pretty certain

that I spent a part of the day with John Kauffmann' foreman, George Weidemann, whose birthday is the same as mine.

X Ques. 7. What time on the morning of the 8th of February, 1870, did you see either Bacon or Hughes?

108 Ans. I suppose I saw them as I usuall' did almost every day for consultation.

X Ques. 8. State whether Bacon or Hughes on that day said anything to you about the note in question or the transaction with the Merchants' National Bank.

Ans. They stated to me then that if the Merchants' National would take the Mr. Jung's note that it would relieve them.

X Ques. 9. What, if anything, was then said to you about strengthening the note by another name?

Ans. Nothing.

X Ques. 10. Did you see the note that day or was it described to you?

Ans. No, sir; it was not described to me on that day; I did not know that they had it then, for the simple reason that I knew that Mr. Bacon could get it when he wanted it. Pro and con they were exchanging notes.

X Ques. 11. You speak of going to John Kauffmann's to get their indorsement; now state if Mr. Hughes or any one else went with you

109 either to the brewery or near it.

Ans. Mr. Hughes went with me to the brewery; he did not go in but staid outside.

X Ques. 12. When you went up to Douglass' office, without going in as you say, how did you make them aware of your presence?

Ans. I went part way up the steps and told some one there I wanted to see Bacon & Hughes; I then returned to the pavement and they came down to where I was, when I told them of what Mr. Yergason wanted of them.

X Ques. 13. Did you see Mr. Howard Douglass that day?

Ans. I don't recollect whether I saw him that day; I may have seen him in the morning.

X Ques. 14. What, if anything, did Hughes or Bacon say to you about an assignment or a contemplated assignment of their firm?

Ans. They told me if Mr. Yergason would accept this note that they would not need to make an assignment; that is, give them credit for that note on their books. They went right down to the bank and went

110 in, stayed a short time, then came out and drove off. I did not see the note then.

X Ques. 15. When you met them upon the street in front of Douglass' office, and they said they would not have to make an assignment if the note was taken by Mr. Yergason, what did they say to you, as to whether the assignment had already been executed, or that they would avoid an assignment?

Ans. They told me that if he would take the note they would avoid making an assignment. The' intimated to me that the papers were ready to sign.

X Ques. 16. When you followed them down to the bank, where did you stand, and how soon after they came out did you see them?

Ans. I was walking back and forth on the south side of Third street, between the corner of Walnut & 3d and the Merchants' National Bank. The first I saw of them after they left the bank was when they drove by in the buggy. They spoke to me, but what they said I don't remember.

X Ques. 17. Were you requested to remain outsid' by Bacon and Hughes?

111 Ans. They knew that I was outside waiting for them.

X Ques. 18. Which way did Bacon & Hughes turn, if at all, when they arrived at Walnut st. in going away from the bank?

Ans. I couldn't tell whether they drove down to the office first, or whether they drove right up Walnut st. to Douglass' office.

X Ques. 19. Do you know whether Bacon & Hughes went to Douglass' office that evening after you saw them at the bank?

Ans. I don't. I didn't see them afterward until the next day.

X Ques. 20. Did you have any further conversation with either Bacon or Hughes about the assignment after they came out of the bank?

Ans. No, sir; not that evening. I was surprised next morning to see it in the papers.

X Ques. 21. Please state whether or not you testified in the case of the Quebec Bank of Toronto against Weyand & Young in the superior court of Cincinnati, No. 26050, befor' Judge Yaple.

112 Ans. I know I testified in the case, but don't remember the number.

X Ques. 22. Please state if in that case on said trial on examination in chief, whether or not you testified: "I went down with them near Merchants' National Bank, and when they came out, I asked them 'how is it?' and they said it was right. Bacon, I think, it was said it."

Ans. I may have so testified; my mind was much clearer on the matter then than it is now; very likely I did testify as reported; then I probably remembered the remark, but now have forgotten the words which were spoken. I know that they did talk to me on that occasion.

X Ques. 23. State whether or not in said case at said trial on cross-examination you testified, "They may have said, 'it's all right;' I can't say which; 'it's all right,' or they had 'got it fixed.' That's what I understood them."

Ans. Yes, in passing remark as they drove by me in the buggy. It now comes to my memory that they did so state. I think I testified in the words above given in the last trial.

113 X Ques. 24. Was John Hughes accustomed to endorse the paper of Geo. M. Bacon & Co.? Also, state whether he had any interest in the firm.

Ans. I can't tell; I hadn't anything to do with the finances. Mr. Sandford C. Hughes attended to that. I had no knowledge of his having an interest in the firm.

F. WEISZMANN.

EXHIBIT C.

The taking of these depositions continued, pursuant to adjournment, E. W. Kittredge being present on behalf of plaintiffs, and John F. Follett on behalf of defendants.

GEORGE M. BACON, of lawful age, being first duly sworn, deposes and says, as follows:

Ques. 1. Please state your name, age, place of residence, and occupation.

Ans. George M. Bacon; residence, Madisonville, Hamilton County, Ohio; grain broker and commission merchant; age 40.

Ques. 2. State whether or not you were a member of the firm of
114 George M. Bacon & Co.; and, if so, who composed said firm when it was organized, and when it ceased business.

Ans. I was, from the organization of the firm until February, 1870. It was composed of myself and Sandford C. Hughes.

By the consent of parties and their attorneys, the further taking of the depositions herein are adjourned until 2 p. m., Friday, January 3d, 1879.

T. H. KELLEY,
*Notary Public, Hamilton County, Ohio.*

The further taking of depositions was continued, pursuant to adjournment, E. W. Kittredge and J. R. Murdoch being present on behalf of plaintiff, and John F. Follett on behalf of defendants.

Ques. 3. Look at the note now exhibited to you, of which the following is the copy:

CINCINNATI, *Feb. 7th*, 1870.

Sixty days after date we promise to pay to the order of Geo. M. Bacon & Co. five thousand dollars at Merchants' N. Bank. Value received.

(Signed) WEYAND & D. JUNG.

[U. S. inter. rev. stamp, $2.50.]

115 (Endorsed:) GEO. M. BACON & CO.
JOHN HUGHES.

Protested April 11th, 1870, and on back of protest marked "1612, circuit court, filed Nov. 6th, 1872.

"THOS. AMBROSE, *Clerk.*"

And state what you know of the giving of said note, the circumstances under which it was given; what consideration, if any, was paid for said note, and what was done with it.

Ans. We, Geo. M. Bacon & Co., had an acceptance due the Merchants' National Bank from Clarkson & Co., Toronto, Canada, through the Quebec Bank of Toronto, balance payment on a lot of barley purchased of them for something over six thousand dollars, payable in gold. The Merchants' National Bank demanded the payment of the same, and I went to Weyand & Jung, and asked them for an accommodation paper for sixty days to take up said amount. I found Mr. Jung was sick abed, and I filled out this note for five thousand dollars, payable sixty days after date, which Mr. Jung signed. I took it down to the Merchants' National Bank, and asked them to discount it, and was told by Mr. Yergason, the cashier, to leave it there till the directors of the bank met, which was about
116 noon, I believe; going there after change, between 1 & 2 o'clock, he told me that they didn't like the paper, and wouldn't accept it. I took the note down to our office, and gave it to Sandford C. Hughes, my partner. After giving the note to Mr. Hughes, who endeavored to realize on it, and not succeeding, we made an assignment on the 9th of February, 1870; we took the note up to Mr. Douglass' office, who is our

attorney, and stated to him what we had endeavored to do. When coming down out of his office, about 3 o'clock, at the corner of Fourth and Walnut, we met Mr. Weiszmann, who informed us that Mr. Yergason wanted to see us at the bank; we went down together to the bank; went into Mr. Yergason's office, and Mr. Yergason asked to see the note; Mr. Hughes took it from his pocket and handed it to him, who said, "We will take this note." Mr. Hughes told him it was too late, that we had made an assignment.

(So much of the last answer as is hearsay evidence or conversations is objected to by plaintiff's counsel.)

Ques. 4. What consideration, if any, was there for said note, and state whether or not at the time it was given, the firm of Weyand & Jung as a firm, or P. Weyand or D. Jung as individuals, were indebted to
117 Geo. M. Bacon & Co.; and, if so, what was the amount of such indebtedness?

(Question objected to by pl'ff's counsel as irrelevant.)

Ans. The note was given to me as an accommodation note, to assist me in taking up this acceptance. To my knowledge, they were not indebted to us in any amount.

Ques. 5. State whether or not, prior to the giving of said note, any attempt had been made by your firm, by note or otherwise, to provide for said gold draft of Clarkson & Co. upon your firm of which you have spoken; and, if so, what was it?

(Question objected to by pl'ff's counsel as irrelevant.)

Ans. Yes, sir; my partner, Mr. Hughes, had gone up to Toronto to make arrangements about extension, and he had made arrangements to send them up an endorsed paper. Upon his return he sent them up a note with the endorsement of Mr. John Hughes, which they returned, demanding some more endorsements, refusing to accept the endorsement of Mr. Hughes. Then they returned this note to us. We took other steps to pay it.

118 Ques. 6. Who represented at Cincinnati the firm of Thomas Clarkson & Co., or the Quebec Bank of Toronto, in the transactions of which you have spoken?

Ans. I suppose the Merchants' National Bank, as all drafts came through them; we knew no other.

Ques. 7. State whether or not the draft of which you have spoken was accompanied by a bill of lading or bills of lading.

Ans. It was, I think.

Ques. 8. Do you know what became of the property shipped under the bill of lading, if any such was attached to the draft?

Ans. It was sold to different brewers, but I don't now remember to whom it went.

Ques. 9. By whom was it sold?

Ans. It was sold by our firm. I don't know whether I sold it or Mr. Hughes.

Ques. 10. State whether or not you had any conversation with either the president or cashier of the Merchants' National Bank in rela-
119 tion to your having received and sold said property; and, if so, what was said in that regard.

Ans. Nothing was said previous to our assignment. The conversation

which occurred took place in Mr. Yergason's office when we met there with the note. I don't recollect now what was said.

Ques. 11. State whether or not, at the time you made your assignment, you had any debts or liabilities pressing for payment except the claim of Thomas Clarkson & Co. or the Quebec Bank of Toronto.

(Question objected to as irrelevant by pl'ff's counsel.)

Ans. We had not.

Ques. 12. After you handed this five thousand dollar note to your partner, Sandford C. Hughes, as you have stated, when did you next see it?

Ans. When it was in Mr. Douglass' office, on the 9th of February, at the date of our assignment.

Ques. 13. State whether or not at the time said note had upon it any United States internal-revenue stamp.

120 Ans. I think not.

Ques. 14. At the time Mr. Yergason took said note from Mr. Hughes what, if anything, was said as to what was to be done with it, or what application was to be made of it?

Ans. Not anything. There was no understanding about it.

Ques. 15. State whether or not at that time Geo. M. Bacon & Co. had executed the deed of assignment of which you have spoken; and, if so, what was done with said date of assignment after its execution.

Ans. We had signed the deed of assignment and left it in the hands of our attorney, Mr. Douglass.

Ques. 16. For what purpose was it left with your attorney?

(Question objected to by pl'ff's counsel as irrelevant and incompetent.)

Ans. Left it with him to be recorded or acted upon according to law.

121 Ques. 17. Were the draft for something over six thousand dollars, of which you have spoken, and the note endorsed by John Hughes for the extension of the time of payment of said draft the only evidences of indebtedness of the firm of Geo. M. Bacon & Co. to either Thos. Clarkson & Co. or the Quebec Bank of Toronto outstanding at the time Mr. Yergason obtained possession, as you have stated, of the note in controversy in this case?

(Question objection to as leading, and assuming fact not testified to by the witness.)

Ans. They were; if I remember correctly the Merchants' National Bank kept the note; but I don't know.

Ques. 18. What evidences of indebtedness did Thomas Clarkson & Co. or the Quebec Bank of Toronto hold against Geo. M. Bacon & Co. for barley purchased of Thos. Clarkson & Co. at the time Mr. Yergason obtained possession of the note in controversy in this case, as you have stated?

Ans. They held this draft accepted by us.

Cross-examination by E. W. KITTREDGE, Esq.:

122 X Ques. 1. With whom are you engaged in business, and where?

Ans. With no one; am by myself; office No. 35 Walnut st.

X Ques. 2. Where did you live in February, 1870, at the time of the transaction in controversy?

Ans. In Covington, Kentucky.

X Ques. 3. Did your firm give Weyand & Jung a note for a corresponding amount to the note sued on in this case, viz, five thousand dollars, dated February 5th, 1870, endorsed by J. Hughes, and subsequently discounted by J. F. Larkin & Co.?

Ans. I think there was a note of that kind.

X Ques. 4. What was the consideration of that note?

Ans. No consideration; that was an accom'odation note; Mr. Hughes had that transaction with Mr. Jung.

X Ques. 4½. Did Mr. Hughes also obtain from Weyand & Jung the note in controversy in this case?

Ans. No, sir; I got it myself.

123 X Ques. 5. Did you testify in a suit between the Quebec Bank of Toronto as plaintiff and Weyand and Jung as defendants in the superior court of Cincinnati in a trial before Judge Yaple at the December term, 1872?

Ans. I did.

X Ques. 7. Did you then testify in respect to the interview with Mr. Yergason when you say he obtained possession of this note after you came out of Mr. Douglass' office from making the assignment, as follows: "I have no recollection of what the conversation was; when I went there, and Mr. Yergason took it my partner handed it to him, and he talked with my partner," or in words to that effect?

Ans. I have given that same evidence right here; I say now that I have no recollection of what conversation took place between Mr. Yergason and Mr. Hughes.

X Ques. 7. Did you at the same time testify as follows: "If I remember right, I said it was to' late; we had made an assignment," or in words to that effect?

Ans. I did, if I remember right; my memory was fresher then than it is now.

124 X Ques. 8. Were you at the Merchants' National Bank on the 8th of February?

Ans. I do not remember whether I was there on the 8th or not.

X Ques. 9. Did you go to the Merchants' National Bank on the 11th or 12th of February and see Mr. Hughes endorse his name upon this five thousand dollar note which has been shown you?

(Question objected to by defendants' counsel as incompetent and irrelevant.)

Ans. Mr. Hughes and I went to the Merchants' National Bank together; some conversation passed between Mr. Hughes & Mr. Fallis, the president, in reference to the matter; I saw Mr. Hughes write his name on the note.

X Ques. 10. Had you gotten and sold the barley covered by the bill of lading attached to the draft you have spoken of prior to the 7th of February, 1870?

Ans. We had.

125 X Ques. 11. And had that been done without the knowledge of the officers of the Merchants' National Bank and while they still held the bill of lading for it?

Ans. I don't know, as we were receiving large lots of barley. This

draft was given for a balance of a cargo. We took possession of the barley as we had been doing for two years.

X Ques. 12. Do you know of the officers of the Merchants' National Bank, or any agent of the plaintiff in this case, having any knowledge that you had got and sold that barley prior to February 7th, 1870?

Ans. I don't know anything about it.

X Ques. 13. Did you, on the 7th day of February, 1870, tell Mr. Fallis or Mr. Yergason, or either of them, that this five thousand dollar note in controversy was a barley note, or a note given to you by Weyand & Jung for barley, or in words to that effect?

(Question objected to by def'ts' counsel, as incompetent and not cross-examination.)

Ans. I did not to my knowledge; I merely asked them to discount the note that I might take up this draft. We were getting a great deal
126 more discounting then than now. Large amounts were sold to all the brewers on time, and a great deal of discounting was done.

X Ques. 14. Did you at the time and at the trial before Judge Yaple before referred to testify as follows: "I think I was at the Merchants National Bank on the 8th. I have no recollection of Sanford C. Hughes being with me. I have no distinct recollection who I saw or what occurred on the 8th at the bank," or in words to that effect?

Ans. I don't remember what my testimony was then; I may have testified to that fact. It has been seven or eight years ago.

Re-examination by JOHN F. FOLLETT:

Ques. 1. State whether or not the five thousand dollar note of which you have spoken as having been given to Weyand & Jung was ever paid by you, or what you know, if anything, about said note after it was given.

Ans. It was never paid by us, and I don't know anything about what became of it afterwards.

Ques. 2. How many interviews did you have with either the president or cashier of the Merchants' National Bank in reference to the
127 five thousand dollar note in controversy in this case prior to the interview between you and Mr. Hughes and Mr. Yergason, when Mr. Yergason got said note?

Ans. I don't remember of any, except on the 7th, when I went to bank to have it discounted. I took it down the same day that the note was dated.

Ques. 3. If you were in the Merchants' National Bank at all on the 8th, did your presence there have any reference to the note in controversy in this case?

(Question objected by plaintiff's counsel.)

Ans. It did not, to my recollection.

GEO. M. BACON.

The further taking of depositions herein is, by consent of parties and their attorneys, adjourned until Saturday, January 4th, 1879, at 10 a. m.

T. H. KELLEY,
*Notary Public, Hamilton County, Ohio.*

128 EXHIBIT D.

SANDFORD C. HUGHES, being first duly sworn, deposes and says as follows:

J. R. Murdoch, esq., being present on behalf of plaintiff, and John F. Follett, esq., on behalf of defendants.

Ques. 1. Please state your name, age, place of residence, and occupation.

Ans. My name is Sandford C. Hughes; 34 years; Price's Hill, 21' ward; clerk in the county treasurer's office of Hamilton County.

Ques. 2. Were you a member of the firm of Geo. M. Bacon & Co.? If so, state who composed said firm, when it commenced business, and when it ceased business.

Ans. Yes, sir; Geo. M. Bacon and myself composed the firm; it commenced business in 1867 and closed in 1870.

Ques. 3. What time in 1870, and in what way did said firm cease doing business?

Ans. It was in February, 1870, and by assignment.

Ques. 4. Look at the note now exhibited to you, a copy of which
129 is set out in the third question of the deposition of Geo. M. Bacon, and state what you know of the execution of said note, if anything; when you first saw it, and what, if anything, you did with it.

Ans. I think the first I saw of the note was on the day it was drawn, on February 7th, 1870. The note was filled up by Geo. M. Bacon, signed by Weyand & Jung; when I first saw it it was just as it is now, except the endorsement of John Hughes. This note then was given to me by Mr. Bacon, and I took Mr. Weiszmann with me to see if we could get the endorsement of some brewer, Mr. Kauffmann or Mr. Moerlein, which we failed in securing. I still held possession of the note until the afternoon of the day we made the assignment. After we made the assignment, in Mr. Howard Douglass' office, and while in the office Mr. Weiszmann came there and said that the Merchants' National Bank had sent a messenger to our office (he being at our office at the time), and said they wanted to see us immediately. Supposing that they wanted to take snap judgment on us, we signed the deed of assignment and instructed Mr. Douglass to proceed with it according to law. Mr. Bacon and I then went to the Merchants' National Bank. We went to the rear of the bank, into the cashier's
130 office I suppose it was, and saw Mr. Yergason, the cashier. I asked him what he wanted with us. He wanted to know how we were getting along, and said he thought something might be done, or words to that effect; he seemed to be friendly with us. Then he says, "Let me see that note of Weyand & Jung's; I gave him the note to see. As soon as he got the note in his possession his manner changed entirely. He said he would keep that note. I demanded the note back. He refused to surrender it. I then told him it wouldn't be of any service to him; that it was an accommodation note, and we had already made an assignment. We left the bank and nothing more occurred at that time.

Ques. 5. State the character and history of the indebtedness of Geo. M. Bacon & Co. to Thos. Clarkson & Co. or to the plaintiff in this case.

Ans. Mr. Clarkson & Co. was paid a commission to purchase barley, we putting up margins demanded by them, drafts following to cover balance of purchase-money. There was a final balance due them of $6,502.56

in gold, for which they drew on us, and the draft was accepted. We found that we wouldn't be able to meet the draft. I went to Toronto,
131 Canada, to see Mr. Clarkson & Co., and from there I went to the Quebec Bank, of Toronto. The manager of the bank agreed to extend the time on the draft forty-five days longer, provided we sent them a note endorsed, which would be accep'able to them. I agreed to do so. The manager of the bank then said he would telegraph the Merchants' National Bank to hold the draft. I came back to Cincinnati; we drew up a note for $6,616.35, payable in gold, and dated December 23d, 1869, payable forty-five days after date; said note was endorsed by John Hughes. I don't exactly remember the time that elapsed—some ten or fifteen days I think, probably longer—when we received a letter from the Quebec Bank, stating that the endorsement was not sufficient; that they must have two endorsers, I think it was, or something to that effect; that they had sent said note back to the Merchants' National Bank; that we should procure a new note and have it endorsed by two parties and send through the Merchants' National Bank. Failing to procure the proper endorsement we were forced to make an assignment.

Ques. 6. Was the note for $6,616.35, payable in gold, of which you have spoken, ever returned to you, and do you know what has become of it?

132 Ans. No, sir; the note never was returned; we were notified that suit had been commenced on the note.

Ques. 7. Do you know whether or not said note was made payable to Thos. Clarkson & Co.?

Ans. Yes, sir; it was.

Ques. 8. Do you remember the day of February, 1870, on which you made your assignment?

Ans. I don't know positively. I don't remember exactly.

Ques. 9. Was there or not a bill of lading accompanying the draft of which you have spoken?

Ans. From my own knowledge I couldn't say. Mr. Bacon was the man who always attended to matters in the bank. When a draft would be sent to the office for acceptance nothing would come but the draft. We, either one of us, accepted drafts when they were sent to the office.

Ques. 10. Do you know whether or not your firm had received all the barley shipped for you by Thos. Clarkson & Co., prior to the time you made your assignment?

Ans. Yes, sir; I think we had.

133 Ques. 11. After Geo. M. Bacon handed you the five thousand dollar note, which has been exhibited to you, what, if anything, did you do with said note in the way of getting it discounted or getting further endorsements upon it?

Ans. I have already stated in my answer to ques. No. 4.

Ques. 12. What time in the day did you receive said five thousand dollar note from Mr. Bacon?

Ans. I couldn't say, but I think it was in the morning, as it is necessary to go early in the day to find the brewers in; I had the note, I think, two days in my pocket.

Ques. 13. At the time you received said note from Bacon, and at the time said note was received from you by Mr. Yergason, as you have stated, state whether or not there was on said note any United States internal-revenue stamp.

Ans. I put none on; did not intend to until we found we could use the note. There was none on. It was our custom to buy the stamp at the bank after notes were discounted.

Ques. 14. At the time of the execution of the five thousand
134 dollar note exhibited to you were Weyand and Jung indebted to you?

Ans. That I don't remember; we never had complete settlement.

Ques. 15. Was there or not any consideration to Weyand & Jung for this five thousand dollar note?

Ans. When Mr. Bacon gave it to me to get endorsements, my understanding was that it was an accommodation paper. I don't know.

(Answer objected to by counsel for plaintiff.)

Ques. 16. Who kept the books of the firm of Geo. M. Bacon & Co., and where are said books now?

Ans. I have charge of the books, but when I was away Mr. Bacon made the entries. We had no book-keeper. The books were enclosed in a box and left at the house we were in, and I don't know where they are now.

Ques. 17. At the time said five thousand dollar note was received by Yergason, what, if anything, was said about discounting the same or any application that was to be made of it?

(Question objected to by plaintiff's counsel on account of repetition and cross-examination.)

135 Ans. Nothing was said; he simply asked to see the note, and kept it without my consent.

(Answer objected to as not responsive to the question.)

Ques. 18. Has the firm of Geo. M. Bacon & Co. ever received the original draft for $6,502.56?

Ans. Not to my knowledge.

Ques. 19. Had said draft, to your knowledge, or by any arrangement with your firm prior to making your assignment, been credited with any payments; and, if so, what and how much?

Ans. Not any to my knowledge.

Cross-examination by J. R. MURDOCK, Esq.:

X Ques. 1. Please state whether the bill of lading attached to the draft of Clarkson for $6,502.56 was for the balance of the barley he shipped you, or whether any more was to come after that.

Ans. I think that draft covered the indebtedness. I think it was the last of the barley.

X Ques. 2. Please state whether you got that barley from the
136 carriers without getting the bill of lading; and, if so, which member of the firm was active in receiving the barley.

Ans. The barley, all that we purchased, was delivered to us as fast as it came, without this bill of lading. I don't remember which member of the firm received this barley.

X Ques. 3. Please state whether you notified the Merchants' National Bank that you desired to get the barley or got any directions from them.

Ans. I did not, and don't know that my partner did.

X Ques. 4. After you got possession of the barley what did you do with it?

Ans. We sold the barley, but to whom I don't recollect, and got the money for it, or most of it.

X Ques. 5. Have you any book which shows the delivery of the barley mentioned in said bill?

Ans. I have not.

X Ques. 6. How long have you been dealing with Weyand & Jung prior to the execution of this note?

Ans. From the time we first commenced business, in 1867.

137 X Ques. 7. State if you have ever been in the habit of dealing Weyand & Jung by way of exchanging paper for accommodation.

Ans. I have sold paper for them, and I think there has been exchanges of paper between us. I have sold their paper with our endorsement for accommodation to raise money for them.

X Ques. 8. Do you know of a note made by Geo. M. Bacon & Co. to the order of Weyand & Jung, and endorsed by John Hughes, at sixty days' time, for five thousand dollars, and discounted at the banking house of J. F. Larkin & Co. on the 7th of February, 1870? If you know of such a note, state what it was for and who effected the discount.

(Question objected by counsel for defendant on account of incompetency and irrelevance.)

Ans. I know there was a note answering the description which you give; but in regards to the arrangements that were made Mr. Bacon was the man who made them. I don't know anything about the discounting of it of my knowledge.

138 X Ques. 9. Do you know whether said note was at J. F. Larkin & Co.'s; and if so, when did you hear of it?

Ans. I heard of it; I don't remember whether before or after our assignment.

X Ques. 10. Do you know for what that note was given, either from your own knowledge or from your dealings with said Weyand & Jung?

Ans. From my understanding our dealings with Weyand & Jung it was for their benefit. They received the proceeds of the note.

X Ques. 11. By the last answer do you mean that it was an accommodation note?

Ans. I think it was. I was not aware that we owed them that amount of money.

X Ques. 12. How soon after you gave that note was this other note of Weyand & Jung to your order for five thousand dollars at same time given to you?

Ans. That I don't know. I think this note of Weyand & Jung was given to me individually on the day it was made, the 7th, or perhaps on the next day, the 8th of February. I don't know on what day it

139 was given. The way I saw it was through Mr. Bacon.

X Ques. 13. After Mr. Yergason had received this note sued on, state what, if anything, you said to him, or what Mr. Bacon said to him in your presence in relation to your having got possession of the barley and having sold it.

Ans. I don't remember anything that was said in that regard. The conversation was about holding the note. We were in the bank only a few minutes.

X Ques. 14. When did you tell Mr. Yergason, if at any time, that you had obtained possession of the barley?

Ans. I never talked to him on the subject at all in regard to that matter. What Mr. Bacon said I don't know.

X Ques. 15. Did Mr. Bacon have any conversation with Mr. Yergason in your presence or while you were in the bank with him, although out of hearing?

Ans. That I don't remember. Of course I was somewhat excited,
140 and he might have had some conversation without my knowing. He kept the note without my consent, which made me mad.

X Ques. 16. Do you remember whether you saw Mr. Fallis?

Ans. I think Mr. Yergason was the only person in the office proper. We did not do any talking to Mr. Fallis; at least, I didn't. He might have been in the other end of the bank.

X Ques. 17. You speak of Mr. Weiszmann coming to see you. Where was he when he received the bank messenger, if you know?

Ans. I don't know, except he told me that he was at our office, on Water street. He said they sent for Mr. Bacon, and wanted him to come right to the bank.

X Ques. 18. What did Weiszmann do after having told you that?

Ans. A few minutes after he left the notice with us we went down to the bank and left him there, or I don't remember where he went; I know he didn't go to the bank with us, nor he wasn't at the bank with us.

141 X Ques. 19. Now, please state whether Mr. Yergason went himself more than once or sent more than one messenger to your office, on Water street, to your knowledge, in relation to this matter.

Ans. The only knowledge I received of his sending down there was the one Weiszmann brought us, and that we obeyed inside of half an hour.

X Ques. 20. How many time' were you at Mr. Douglass' office, during the preceeding three or four days?

Ans. That I don't remember; probably twice.

X Ques. 21. What day did you first consult Mr. Douglass about your business affairs generally?

Ans. I don't remember, except on the day that we made our assignment.

Re-examination by JOHN F. FOLLETT:

Ques. 1. You have spoken of a note of five thousand dollars given by Geo. M. Bacon & Co. to Weyand and Jung, said to have been discounted at the bank of J. F. Larkin & Co.; who paid said note?

Ans. Of my own knowledge I don't know. We didn't.

142 Ques. 2. Was payment of said note ever demanded of the firm of Geo. M. Bacon & Co. to your knowledge?

Ans. Not to my knowledge. Our assignment was made before its maturity.

Ques. 3. Do you remember whether or not you were at the office of Mr. Douglass in relation to the assignment of Geo. M. Bacon & Co. more than once?

Ans. That I don't remember.

Ques. 4. How many times did you exhibit the five thousand dollar note in controversy in this case to Mr. Douglass?

Ans. I think he asked if we couldn't still keep up. I showed him the

note, and told him that we couldn't get the endorsers and would have to assign. He only had it once to my knowledge.

SANFORD C. HUGHES.

By consent of the parties and their attorneys the further taking of the depositions is adjourned until Thursday, February 13th, 1879, at 5.30 p. m.

T. H. KELLEY,
*Notary Public, Hamilton County, O.*

143 Pursuant to adjournment, the further taking of the depositions herein was continued on Tuesday, February 13th, 1879, at 5.30 p. m. J. R. Murdock being present on behalf of plaintiff and John F. Follett on behalf of defendant.

EXHIBIT E.

HOWARD DOUGLASS, being first duly sworn, testifies as follows:

Ques. 1. State your name, residence, and occupation, and how long have you been so employed?

Ans. Howard Douglass; Cincinnati; attorney, and have been so emploped ever since I was 21 years of age.

Ques. 2. Look at the deed of assignment now exhibited to you and copy of which is hereto attached and offered in evidence herein, and state by whom it was drawn, when, and what you know with reference to the same.

Ans. I drew the deed of assignment; it is in my hand-writing; I drew the same either on the 8th or 9th of February, 1870, and it was signed on the 9th. There were very few interviews in relation to the assignment. It was drawn at the instance of Geo. M. Bacon & Sanford C. Hughes.

144 partners as Geo. M. Bacon & Co. The cause of the same, as they stated, was the failure to pay an accepted draft of the Bank of Toronto, and there was considerable talk of criminal proceedings being instituted by the bank; as for their having received a large amount of barley, for which a draft with bills of lading attached had been drawn and transferred to said bank.

(So much of the answer as relates to the cause of the assignment objected to by counsel for pl'ff't's.)

Ques. 3. Do you remember what time in the day said deed of assignment was executed, and what was done with it after its execution?

Ans. I think it was executed about noon on the 9th of February, and was sent up to the court-house very shortly after its execution.

Ques. 4. Look at the note for $5,000 now exhibited to you, and a copy of which is herein set out in question 3 of the direct examination of Geo. M. Bacon, and state whether or not you saw said note at or about the time of the execution of the deed of assignment, in whose possession it was, if you did see it, and all you know in that regard?

145 Ans. I am satisfied I saw a note for $5,000.00, signed by Weyand & Jung and endorsed by Hughes, in the possession of either Bacon, Hughes, or Weiszmann, I have forgotten which; we were all of us together on the day that the deed of assignment was signed. I don't know whether this is the same note or not. The only fact I have to remember is the fact of the threat to commence criminal proceedings, of which I have before spoken, and the statements to me by Bacon and

Hughes that they had procured this note of Weyand & Jung and had it tendered to the Merchants' National Bank on account of the Quebec Bank of Toronto claim, this bank (the Merchants' National Bank) had refused to receive it.

(Counsel for plaintiff objects here to all part of the answer above detailing conversations with Bacon & Hughes.)

Ques. 5. State whether or not any reason was given to you by Bacon & Hughes for making their assignment, and, if so, what reason they gave?

(Counsel for plaintiff objects to the question because of incompetency.)

146 Ans. The fact of being unable to meet their indebtedness through the Bank of Toronto, and the fact that they could not make any arrangement with the bank for the payment of the same.

Cross-examination by J. R. MURDOCK:

X Ques. 1. Please state when you were first consulted by Geo. M. Bacon & Co. about there business affairs, during January or February, 1870.

Ans. I cannot say, but my impression is that I saw them but very few times. They were brought to me by Mr. Weiszmann.

X Ques. 2. Do you recollect how many times you had seen them before the assignment was made?

Ans. Very few, not over 4 times, three or four times.

X Ques. 3. Do you recollect whether you saw them upon the 5th of February, 1870, being Saturday? And, if so, state how many of them there were, and who came with them.

Ans. No; I do not.

X Ques. 4. Do you recollect whether you saw them on the 7th of February, the date of this note in question?

147 Ans. No; I do not recollect.

X Ques. 5. Do you recollect whether you saw them on the 8th of February; and, if so, when and where?

Ans. I am satisfied I saw them on the 8th at my office, and that I prepared the deed of assignment on that day.

X Ques. 6. Who were present on that occasion?

Ans. I think Weiszmann and Bacon.

X Ques. 7. Why was the deed not executed that day?

Ans. They did not desire to execute a deed unless compelled by the refusal of the Bank of Toronto to arrange with them, by accepting the note of Weyand & Jung.

X Ques. 8. What time of day was this?

Ans. About noon, I think.

X Ques. 9. Did you not testify in a case where the Quebec Bank of Toronto was plaintiff and Weyand & Jung was defendant, in the supreme court of Cincinnati, before Judge Yaple, December term, 1872?

148 Ans. I don't know. I don't know that I ever testified before.

X Ques. 10. Did you not say on that occasion, I made the deed of assignment on February 7th, 1870?

Ans. Yes, I might have said so; I might have drawn it up on the 7th or 8th.

X Ques. 11. Was your recollection at that time any better than it is now on that point?

Ans. Yes, sir.

X Ques. 12. Please state whether Sanford C. Hughes was present when the assignment was drawn?

Ans. No person was present when the assignment was drawn.

X Ques. 13. How many days, if at all, before said 7th, were you requested to draw that deed and by whom were you requested ?

Ans. There was some talk about an assignment either on the 7th or 8th, and I drew the deed of assignment so as to have it ready if it was necessary. I drew it without any particular directions from any person.

149 X Ques. 14. When did you first learn of the existence of this note of Weyand & Jung in question ?

Ans. I think on the same day that the note was executed.

(X Ques. 15. Withdrawn.)

X Ques. 16. Do you know whether Hughes had gone to see John Kauffmann and others for additional endorsement at the time the note was first shown you ?

Ans. At the time it was first shown to me it had not been presented to the Merchants' National Bank ; I do not know whether they went for additional endorsement or not.

X Ques. 17. Were Bacon & Hughes ever together in your office prior to the assignment ; and, if so, what day was it ?

Ans. I think they were both there the day that the assignment was signed. I don't remember that they were there together at any other time.

X Ques. 18. Do you know anything about Mr. Yergason, of the Merchants' National Bank, sending a messenger to Bacon & Co. say-

150 ing that he wanted to see them, and of its delivery to your office? And, if so, state when that was.

Ans. No, sir ; I do not.

X Ques. 19. Were you acquainted with John Hughes at the time this assignment was executed ?

Ans. I don't think I ever heard of John Hughes ; I never met John Hughes until the day he accepted the trust.

X Ques. 20. Where was that trust accepted, and when ?

Ans. At my office, the day after it was signed.

X Ques. 21. Where had the deed been in the mean time ?

Ans. I held it.

X Ques. 22. How long were you instructed to hold it, if at all ?

Ans. When it was signed they stated that Mr. Hughes would be down either that afternoon or early next morning to accept the trust.

X Ques. 23. I understand you to say that he did not in fact come down until next day, the 10th of February ?

151 Ans. Yes, sir.

X Ques. 24. Who came with him at that time ?

Ans. I think his son.

X Ques. 25. I call your attention to your answer in chief above, in which you say that the deed was executed about noon and sent to the court-house very shortly after its execution. Now state if you remember what day and hour it actually was sent to the hourt-house.

Ans. It was executed on the 9th ; accepted by John Hughes, the assignee, on the 10th, and filed at 2.45 p. m. on the evening of the 10th.

X Ques. 26. When you saw Bacon & Hughes on the 9th of February at your office, as you say, and also Mr. Weiszmann, do you recollect whether they came together or not?

Ans. Bacon came to my office, as I now recollect, and waited until Hughes came back from the Merchants' National Bank, where he went with Weyand & Jung's note for five thousand dollars. He came back with the note; stated that he could not discount it, produced the note, and then each
152 signed the assignment. Whether Weiszmann was there at that particular time or not I don't know, but he was there that day.

X Ques. 27. When you saw Bacon, Hughes & Weiszmann on the 9th of February at your office, as you say, do recollect whether they came together or not?

Ans. I think not. Weiszmann was there on that day at my office.

X Ques. 28. Have you two offices or not, and which office was he in?

Ans. At that time I was not using my back office; I was using the front.

X Ques. 29. Did you talk to Mr. Weiszmann; and, if so, what was the general subject of conversation?

Ans. Yes; we talked generally about the affairs of the firm.

X Ques. 30. Was anything said about making an assignment, or an assignment having been made?

Ans. I don't recollect.

153 X Ques. 31. In your answer to the 4th question in chief you say, "I saw the note for $5,000.00, signed by Weyand & Jung, and endorsed by John Hughes, in the possession of either Bacon or Hughes or Weiszmann; I have forgotten which; we were all of us together on the day the deed of assignment was signed." Is your recollection any clearer now on that subject then when said answer was made?

Ans. Yes, sir; it is.

X Ques. 32. If you were all together, and the note was produced, please state if Mr. Weiszmann saw it, and what was said to him in relation to it.

Ans. Mr. Weiszmann was generally with either Bacon or Hughes when they came to my office. Hughes, when he came up from the bank, was very mad, and pitched the note on the table. Now, as to whether Weiszmann was present at that time I cannot now state. He was in my office several times during the day. He recommended Bacon & Hughes to me, and took a great deal of interest in them.

154 X Ques. 33. What was his business, calling on you two or three times that day?

Ans. In regard to the affairs of Bacon & Company.

By consent of parties and their attorneys, the further taking of the testimony herein is adjourned until Friday, February 14th, 1879, at 11.30 o'clock a. m.

T. H. KELLEY,
*Notary Public, Hamilton County, Ohio.*

Pursuant to adjournment the testimony of Howard Douglass was continued on Friday, February 14th, 1879, at 11.30 a. m., J. R. Murdoch being present on behalf of pl'ffts and John F. Follett on behalf of defendants:

X Ques. 34. Might it not have been in fact that you saw Bacon &

Hughes and Weiszmann on the 7th of February, when you were first consulted about the assignment?

Ans. Yes, sir.

X Ques. 35. Do you know on what day the Merchants' National Bank, agents for the Quebec Bank of Toronto, first learned that the barley had been taken by Bacon & Co. from under the bill of lading?

155 Ans. I do not.

X Ques. 36. Were you informed by Bacon & Co., or by the bank, of the threat of criminal proceedings. And, if so, state when you had that information conveyed to you.

Ans. By Bacon & Co. I never had any conversation with the bank, or any of its officers. The conversation occurred within two or three days before the assignment.

X Ques. 37. Do you recollect of Bacon & Hughes, or either of them, coming to your office after 4 o'clock on the evening of the 7th of February, and after their interview at the bank?

Ans. I cannot say that I do.

X Ques. 38. Did you see them any afternoon after bank hours about that time?

Ans. I cannot recollect.

X Ques. 39. What is your best recollection as to the time you saw them on the 7th of February, the time you saw them on the 8th, if at all, and also the time you saw them on the 9th of February, 1870?

156 Ans. It is very indistinct. I have my recollection of the assignment on the date thereof. I saw a note of Weyand & Jung's for $5,000 in Hughes' possession when the deed was signed. I saw them on the 7th, the 8th, 9th, and 10th, but I cannot now state the conversation had on each respective day, nor the hours when I saw them.

X Ques. 40. Were you shown the exchange note for $5,000 made by Bacon & Co. to the order of Weyand and Jung at sixty days?

(Question objected to by counsel for defendant, for the reason that there was no such note nor any proof of such note in this case.)

Ans. No, sir; not that I have any recollection of.

X Ques. 41. Did you not know of its discount at the banking-house of J. F. Larkin & Co., on the 7th of February, 1870, and was not that liability mentioned to you by these parties?

Ans. I have no recollection of it.

X Ques. 42. Being now in your office, and your papers accessible, please state if, upon examination, you can find any memorandum in relation to these visits you have above testified to, or of said assignment,

157 or of said note.

Ans. I can not.

HOWARD DOUGLASS.

By consent of parties the further taking of depositions herein is adjourned until .

T. H. KELLEY,
*Notary Public, Hamilton County, Ohio.*

158 EXHIBIT.

*Copy of deed of assignment of Geo. M. Bacon & Co. to John Hughes.*

This indenture, made the ninth day of February, A. D. 1870, between George M. Bacon and Sanford C. Hughes, copartners under the name style of firm of Geo. M. Bacon & Company, in the business of commission merchants and dealers in hops, grain, &c., of the first part, and John Hughes of the second part.

Whereas the said copartnership is justly indebted in sundry considerable sums of money, and has become unable to pay the same with punctuality, and the said parties of the first part are desirous of making a fair and equitable distribution of their property and effects among their creditors:

Now, therefore, this indenture witnesseth that the said parties of the first part, for and in consideration of the sum of one dollar to them paid by the said party of the second part, have granted, bargained, and sold, released, assigned, transferred, and set over, and by these presents do grant, bargain, and sell, release, assign, transfer, and set over unto the said party of the second part all the goods, chattels, merchandize, bills, bonds, notes, book accounts, claims, demands, choses in action, evidences of debt, and property of every description of the said parties of the first, to have

159 and to hold the same unto the said party of the second part, his heirs and assigns; in trust, nevertheless, and to and for the following uses, interests, and purposes, that is to say: that the said party of the second part shall take possession of all the property hereby assigned, and shall sell and dispose of the same and convert the same into money, and by and with the proceeds pay the costs, charges, and commissions and expenses of carrying into effect this assignment; and, second, pay off and discharge all the firm debts, notes, or drafts due or to grow due from said parties of the first part in full; and in case the same are not sufficient, then to distribute said net proceeds pro rata, share and share alike, among the several creditors of said parties of the first part; and, lastly, to return to said parties of the first part the surplus of said net proceeds and avails, if any there shall be. And for the better execution of these presents said parties of the first part do make, constitute, and appoint said party of the second part their true and lawful attorney for them, and in their name, place, and stead to do, transact, and perform all acts, deeds, matters, and things necessary to be done for the carrying into effect of this assignment.

160 In witness whereof the said parties of the first part have hereunto set their respective hands and seals the day and year above written.

GEO. M. BACON. [SEAL.]
SANFORD C. HUGHES. [SEAL.]
GEO. M. BACON & CO. [SEAL.]

I accept the execution of the foregoing trust.

JOHN HUGHES.

CIN., *Feb'y 9th*, 1870.

Copy.

[5. U. S. internal revenue certificate. 5. Five cents. 5. 5. G. M. B. & Co., 2, 9, '70.] 5. U. S. internal revenue certificate. 5. Five cents. 5. G. M. B. & Co., 2, 9, '70. 5.]

161 THE STATE OF OHIO,
*County of Hamilton, ss:*

I, T. H. Kelley, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named Fredrick Weiszmann, Geo. M. Bacon, Sanford C. Hughes, and Howard Douglass were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed as above set forth were reduced to writing by me, who am not interested in the suit, in my presence and in the presence of the witnesses, respectively, and were subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice specified, and were continued from day to day as above set forth; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this 22d day of February, A. D. 1879.

T. H. KELLEY,
*Notary Public, Hamilton County, Ohio.*

162 And afterwards, to wit, on the seventeenth day of February, in the year of our Lord one thousand eight hundred and eighty, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

| | | |
|---|---|---|
| THE QUEBEC BANK OF TORONTO *vs.* MAX HELLMAN, ASSIGNEE OF P. WEYAND AND D. Jung, partners as Weyand and Jung, successor to John Schiff, assignee of said Weyand & Jung. | 2527. | Chancery. |

This day this cause came on to be heard upon the petition of plaintiff, the answer of defendant, the reply of plaintiff, and upon the stipulations and evidence in writing on file in this case, and was argued by counsel and submitted to the court in the premises; and upon consideration thereof the court doth find the equities of the case in favor of the defendant, and that the promissory note set out and described in plaintiff's petition is not a valid claim against the estate of said assignors, Weyand and Jung, and that the said plaintiff is not entitled to a decree as prayed for in the petition herein.

It is therefore considered, adjudged, and decreed that the petition of plaintiff be, and the same is hereby, dismissed, and that the defend-
163 ant go hence without day and recover of plaintiff the costs of this proceeding to be taxed.

And thereupon the plaintiff give' notice of an appeal to the Supreme Court of the United States, and the court allowed said appeal, and fixed the amount of the bond therefor at the sum of $500.00.

164 THE UNITED STATES OF AMERICA,
*Southern District of Ohio, ss:*

I, William C. Howard, clerk of the circuit court of the United States

for the southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case wherein the Quebec Bank of Toronto is plaintiff and Max Hellman, assignee of Weyand & Jung, is defendant, as fully and completely as the same remain in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati, this 15th day of October, A. D. 1880, and in the one hundred and fifth year of the Independence of the United States of America.

Attest:

[SEAL.] WILLIAM C. HOWARD,
*Clerk U. S. Cir. Ct. S. D. O.*

Supreme Court of United States.

THE QUEBEC BANK OF TORONTO
*vs.*
MAX HELLMAN, ASSIGNEE OF WEYAND & JUNG.

It is hereby stipulated by the parties hereto that the answer in above case, filed Nov. 8, 1877, in circuit court of the United States for southern district of Ohio, may be made part of the record in the Supreme Court of the United States, and printed in said record, and be of same force as if set out in full in the transcript.

Nov. 13, 1880.

J. B. STALLO,
E. W. KETTRIDGE,
*Counsel for Quebec Bank.*
ADAM A. KRAMER,
*Counsel for Defendant Max Hellman, Assignee of Weyand & Jung.*

165 (Indorsed:) Supreme Court U. S. 1880. October term. No. 1073. Quebec Bank of Toronto vs. Hellman. Stipulation of counsel and addition to record. Filed 15th November, 1880.

(Indorsement on cover:) No. 179. The Quebec Bank of Toronto, appellant, vs. Max Hellman, assignee of P. Weyand and D. Zung, partners as Weyand & Zung, successor to John Schiff, assignee of said Weyand & Zung. S. Ohio C. C. U. S. Filed 25 October, 1880.

110-176

OFFICE SUPREME COURT U. S.
FILED
DEC 3 1883
JAMES H. McKENNEY, Clerk

*Robert Clarke & Co., Printers, Cincinnati, O.* [*Nov., 1883.*

# Supreme Court of the United States

OCTOBER TERM, 1883.

*The Quebec Bank, of Toronto, Appellant,*

*No. 179.* vs.

*Max. Hellman, Assignee of P. Weyand and D. Jung, Partners as Weyand & Jung, Successor to John Schiff, as Assignee of said Weyand & Jung.*

**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.**

**BRIEF FOR APPELLANT,**

**By STALLO & KITTREDGE.**

*Robert Clarke & Co., Printers, Cincinnati, O.*] [*Nov., 1883.*

# Supreme Court of the United States

OCTOBER TERM, 1883.

*The Quebec Bank, of Toronto, Appellant,*

*No. 179.*] *vs.*

*Max. Hellman, Assignee of P. Weyand and D. Jung, Partners as Weyand & Jung, Successor to John Schiff, as Assignee of said Weyand & Jung.*

**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.**

**BRIEF FOR APPELLANT,**

**By STALLO & KITTREDGE.**

## STATEMENT OF THE CASE.

The case was a bill in equity by the Quebec Bank, of Toronto, Ontario, against Max. Hellman (substituted for John Schiff, deceased), assignee of P. Weyand and D. Jung, partners as Weyand & Jung. The bill alleged an assignment by Weyand & Jung, under and in pursuance of the insolvent laws of the State of Ohio, the qualification of the assignee; and that Weyand & Jung, at the time of the assignment, were indebted to the appellant, The Quebec

pellant was not the owner of the note in controversy, rests, as we suppose, upon the testimony of Sanford C. Hughes, who testifies in answer to question 4, page 46, of the Record, that, on the 9th of February, 1870, the firm of George M. Bacon & Co. made an assignment, and he then proceeds as follows: "I still held possession of the note until the afternoon of the day we made the assignment. After we made the assignment, in Mr. Howard Douglass' office, and while in the office, Mr. Weiszmann came there and said that the Merchants' National Bank had sent a messenger to our office (he being at our office at the time), and said they wanted to see us immediately. Supposing that they wanted to take snap judgment on us, we signed a deed of assignment and instructed Mr. Douglass to proceed with it according to law. Mr. Bacon and I then went to the Merchants' National Bank. We went to the rear of the bank, into the cashier's office I suppose it was, and saw Mr. Yergason, the cashier. I asked him what he wanted with us. He wanted to know how we were getting along, and said he thought something might be done, or words to that effect: he seemed to be friendly with us. Then he said: 'Let me see that note of Weyand & Jung's.' I gave him the note to see. As soon as he got the note in his possession his manner changed entirely. He said he would keep that note. I demanded the note back. He refused to surrender it. I then told him it would not be of any service to him, that it was an accommodation note, and we had already made an assignment. We left the bank, and nothing more occurred at that time."

The Merchants' National Bank was the agent of appellant, and the object of this testimony was to show that the appellant obtained no title to the note by getting possession of it in this manner, and by this means, and that

they so came into possession of it on the 9th of February. It was also claimed that this possession of the Merchants' National Bank, as agents for the plaintiffs, was obtained after George M. Bacon & Co. had made an assignment to John Hughes for the benefit of their creditors.

By the testimony of Howard Douglass, attorney for George M. Bacon & Co., the assignment of George M. Bacon & Co. to John Hughes was written on the 7th of February, and delivered on the 10th of February, at 2 o'clock and 50 minutes, p. m. (See testimony of Howard Douglass, Record, page 53, cross-question 19 to cross-question 25, inclusive). There is a confused effort by Mr. Douglass, as well as by Mr. George M. Bacon, to prove that the possession of the Merchants' National Bank, as agent of the appellant, of the note in question, was obtained on the 9th of September.

Of course, the question whether this note was indorsed and transferred by George M. Bacon & Co. to appellant, or was seized by appellant's agent wrongfully and without their consent, is a question of fact, arising upon the evidence to which we shall presently refer to establish that it was so indorsed and transferred to appellant, and that this transfer was on the 7th and not the 9th of February, and was certainly prior to the assignment by George M. Bacon & Co. to John Hughes. But if the weight of the evidence establishes that the note was indorsed and transferred to appellant, and not wrongfully obtained by them as Mr. Sandford Hughes testifies, even if it was after they had executed and delivered their deed of assignment to John Hughes, we submit: First, that if this was accommodation paper of Weyand & Jung, and so held by George M. Bacon & Co., no title to it passed by their assignment to John Hughes. The assignee for the benefit of creditors would acquire no greater right to maintain an action against Wy-

and & Jung than their assignor had. On the other hand, the transfer of the paper by George M. Bacon & Co. to appellant, or to any stranger for value, after the assignment, as well as before, might well enable them to derive the very benefit intended by the accommodation to be given to them, by enabling them to settle with their creditors and so get rid of the assignment and its consequences. Secondly, if for any reason title to the note did pass to John Hughes as assignee of Bacon & Co., it is undisputed that John Hughes indorsed this note to appellant on the 11th of February. That indorsement can not be varied or limited by parol. *Brown* v. *Spofford*, 95 U. S. 474. And whatever title John Hughes had, passed by this indorsement to appellant.

Story on Prom. Notes, Sec. 123.

Byles on Bills, 54.

Thirdly, by the assignment law of Ohio, the assignment took effect only from the time of its delivery to the Probate Judge on February 10th at 2 o'clock and 50 minutes p. m. This was after the transfer to appellants, if it was transferred to them at all. The language of the law, Revised Statutes of Ohio, Sec. 6,335, is as follows: "Any such assignment shall take effect only from the time of its delivery to the Probate Judge, and the exact time of such delivery shall be indorsed thereon by the Probate Judge, who shall immediately note the filing on the journal of the Court; and it may be delivered by the assignor to the Probate Judge either before or after its delivery to the assignee."

But to meet this claim of the defendants in every aspect of it, the appellant relies upon the evidence. The doctrine declared by this Court in *Collins* v. *Gilbert*, 94 U. S. 753, is, that, when the appellant produced the note and offered it in evidence, the presumption is that it became the

holder of it for value at its date, in the usual course of business, without notice of anything to impeach his title. And the appellant meets the testimony of Mr. Sandford Hughes, above quoted, when it is offered to overcome this presumption, by the testimony of Daniel J. Fallis, president of the Merchants' National Bank of Cincinnati, which, in this transaction, acted as the agent of the appellant (Record, pp. 18-19, questions 2 to 10 inclusive); and the cross-examination of the same witness (Record, p. 25, questions 14 to 22 inclusive), and also cross-questions 35 and 36, Record, p. 27. We call particular attention to that part of this testimony in respect to the revenue stamp, and the memorandum made of it, as fixing the date of the transaction.

Also by the testimony of H. G. Yergason, cashier of the Merchants' National Bank. (Record, p. 20, questions 4 to 10 inclusive, and his cross-examination, pp. 31-32, questions 11 to 15 inclusive.)

This witness also fixes the date of the interview by him with Frederick Weiszmann, upon whose testimony the defendant relied to fix the 9th of February as the date of this transaction, that interview being on the 5th of February, which was Saturday, and the transaction itself with the Bank, following the interview, on the 7th of February, by the letter of appellant, and the date of its receipt by the witness. (Record, p. 31, cross-questions 7 *et seq.*).

But to put the matter beyond all question, and to show conclusively that the cashier of the bank did not simply seize this note without the consent of Geo. M. Bacon & Co., as Mr. Sandford Hughes testified, Mr. Fallis testified (Record, p. 19, question 6), that, when the bank received the note, on the 7th of February, Mr. Geo. M. Bacon promised that John Hughes should come and indorse the note. And Mr. George M. Bacon testifies (Record, p. 44, ques-

tions 8 and 9), that he did go with John Hughes on the 11th of February, after John Hughes had become the assignee of Geo. M. Bacon & Co., to the Merchants' National Bank, and was present and saw John Hughes indorse this note. Is the Court to be asked, after this, to believe that the officers of the bank seized the note from Bacon & Co. without their consent, and with no transfer of title to the appellant? The Court will observe that the indorsement and transfer, as testified to by Mr. Fallis and Mr. Yergason, was in the afternoon of February 7th, when Mr. Bacon came without his partner to see if the note was discounted. Mr. Bacon was present when Sandford Hughes says he handed the note to Mr. Yergason, and he heard no such statement or conversation as Sandford Hughes testified to as occurring on that occasion. (Record, p. 42, question 10, and p. 44, cross-question 7.) Sandford Hughes did not hear what Bacon said on that day. (Record, p. 50, questions 14 to 16 inclusive.)

But Geo. M. Bacon and Sandford Hughes left the bank together. And, we repeat, two days afterward, on the 11th of February, Mr. Bacon returned with John Hughes to indorse the note. Is that consistent with a wrongful, violent seizing of the note by the officers of the bank on the 9th of February, without the consent and against the will of Geo. M. Bacon & Co.?

Mr. Weiszman's testimony, whenever this transfer occurred, is that it was before the assignment, and when Bacon and Sandford Hughes came out of the bank they told Weiszman they had fixed it with the bank, and it was all right. (Record, p. 39, cross-questions 14 to 23 inclusive.)

There are no other questions that we are aware of in this case. We could only extend this brief by quoting the

evidence in place of citing it by reference to it, which we do not understand would facilitate the Court. We affirm that the Court below erred in rendering a decree for the appellee, and submit that the appellant is entitled to a decree that the appellee allow this claim, with interest, in the settlement of this trust.

STALLO, KITTREDGE & WILBY,
*Of Counsel for Appellant.*

J. B. Stallo
C. W. Kittredge

110-178

# Supreme Court of the United States.

The Quebec Bank of Toronto,

APPELLANT,

No. 179. —— VS. ——

Max Hellman, Assignee of P. Weyand and D. Jung, partners as Weyand & Jung, successor to John Schiff, as Assignee of said Weyand & Jung,

APPELLEE.

## Brief for Appellee.

JOHN F. FOLLETT, and
ADAM A. KRAMER,
Counsel for Appellee.

1883:
Printed under the supervision of GEO. R. TOPP, Law Printer,
CINCINNATI, OHIO.

# Supreme Court of the United States.

The Quebec Bank of Toronto,

APPELLANT,

No. 179. —— VS. ——

Max Hellman, Assignee of P. Weyand and D. Jung, partners as Weyand & Jung, successor to John Schiff, as Assignee of said Weyand & Jung,

APPELLEE.

## Brief for Appellee.

STATEMENT OF CASE.

This was an action brought in the Circuit Court of the United States for the Southern District of Ohio, by the appellant to require the appellee to allow and pay out of the assets which came into his hands to be administered as assignee of Weyand & Jung, a firm formerly engaged in business in Cincinnati, Ohio, a note in the sum of five thousand dollars with interest dated February 7, 1870, executed

by P. Weyand and D. Jung, payable to the order of George M. Bacon & Co.

The history of the transaction attending the making and acquiring of the note in controversy, was as follows:

George M. Bacon & Co. were a firm, doing business at Cincinnati, Ohio, their business being, among other things, dealing in barley. They purchased barley at Toronto, Canada, advancing margins upon the barley purchased, and, as shipments were made, drafts were drawn upon them by the consignor, for the amount remaining unpaid upon such shipment, which were usually time drafts accompanied by the bill of lading for the barley shipped.

On the 10th day of November, 1869, a draft was drawn on said firm by Thomas Clarkson & Co., at Toronto, Canada, in the sum of $6,502.56, payable in gold, twenty-five days after date, which draft was endorsed by Thomas Clarkson & Co., and on presentation to the drawees at Cincinnati, Ohio, was accepted by George M. Bacon & Co., said draft accompanying a bill of lading for fifteen thousand bushels of barley. Said barley was shipped from Toronto to Toledo, Ohio, consigned to Reynolds, Whiting & Bangs, with instructions to them to forward the same to Brighton station, Cincinnati Ohio, to the order of The Quebec Bank of Toronto. Messrs. Reynolds, Whiting & Bangs, instead of forwarding the barley by rail, forwarded the same by canal boat, and on its arrival at Cincinnati, George M. Bacon & Co. were notified, and they received the barley and disposed of it. About the time the draft would by its terms mature, one of the members of the firm of Geo. M. Bacon & Co. went to Toronto and made an arrangement with the appellant the holder of the draft for an extension of time for the

payment of same forty-five days, agreeing to give a note with endorsers to take up the draft. A note was accordingly executed by George M. Bacon & Co. in the sum of $6,616.35, payable in gold, and dated December 23, 1869, payable forty-five days after date to the order of Thomas Clarkson & Co., and endorsed by John Hughes, which was forwarded to the appellant. The appellant on receipt of said note, returned the same to The Merchants National Bank of Cincinnati, with instructions to notify Bacon & Co., that the note was not in proper form, and that it should have at least two good endorsers, and that when a note properly executed and with proper securities was forwarded to them, they would instruct The Merchants National Bank, to deliver up the original draft and bill of lading. No such note as required by appellant was ever executed or forwarded, and on the 2nd day of February, 1870, appellant wrote to The Merchants National Bank, directing that a demand of payment of the original draft should be made, and on failure to pay the same, the barley should be turned over to Perin & Gould, of Cincinnati, for sale, the proceed of such sale to be applied in payment of said draft.

On the 7th of February, 1870, George M. Bacon & Co., upon representation to Daniel Jung, of the firm of Weyand & Jung, that said firm of George M. Bacon & Co., were in trouble in regard to raising funds to pay a claim about to mature, and requesting a note in the sum of five thousand dollars to enable them to pay off such claim, obtained the note in controversy, the same being an accommodation note executed by Daniel Jung who signed thereto the individual name of both himself and partner, and so far as disclosed

by the testimony, without the knowledge or consent of Peter Weyand, his partner.

How The Merchants National Bank came in possession of said note is the principal matter in contention between the parties hereto, and our view of that question will be presented in the argument.

There is no dispute however, that The Merchants National Bank as agent of appellant retained and still holds the original draft in the sum of $6,502.56, payable in gold with the bill of lading for fifteen thousand bushels of barley accompanying it, and the note of Geo. M. Bacon & Co. for $6,616.35 in gold, and that neither of said instruments have been endorsed by the payment of any sum whatever,—that a suit was brought on said note by the appellant on the 25th of February, 1870, in the Superior Court of Cincinnati, against Geo. M. Bacon & Co., as makers, and John Hughes as endorser, claiming the full amount of said note and interest payable in gold. On the 9th day of February, 1870, said note for $6,616.35, gold, was protested for non-payment, and on the same day, George M. Bacon & Co. executed a deed of assignment for the benefit of their creditors, for the reason, as they alleged of their inability to pay said note or to take up said draft.

## ARGUMENT.

### I.

The note in controversy was never delivered to appellant.

To make a delivery valid and effectual in law, the note

must have been turned over with the intention on the part of both parties to vest the title to the same in the appellant.

*I Parsons on Contracts*, 475 *et seq.*

*I Story on Contracts*, Sec. 377, *et seq.*

*I Parsons on Notes and Bills*, Sec. 7, p. 48, and cases cited in notes.

*Hatton vs. Jones*, 78 Ind., 466.

The evidence in this case upon the question of the delivery of said note to the officers of the Merchants' National Bank, we think shows conclusively that no such delivery was made of said note as would pass title to the same to the appellant.

D. J. Fallis, President of the Merchants' National Bank testifies, (printed Record, p. 18.) "On the morning of the 7th of February, 1870, Geo. M. Bacon left said note in my hands as President of the Merchants' National Bank for discount. It was brought with other notes at noon, the hour of discount, into my room. The discount committee declined discounting said note. I did not see Bacon personally in the morning when he left the note on the cashier's desk; but during the afternoon, and when Mr. Bacon called to learn the result, I saw him and informed him that the paper had not been discounted by the Merchants' National Bank. He then stated as an argument why it should be discounted, that the proceeds were for a payment on a claim for barley received by us as correspondents of the Quebec Bank. Whereupon I informed him that we would discount the paper for the Quebec Bank and credit proceeds on his obligation which we held for that bank. Mr. Bacon asked for the note, that he might see another party and return same in a short time if he did not make other arrangements, which other arrangements were to return the note, or to bring the proceeds in money aforesaid. Mr. Bacon returned the note, and handed it to our cashier Mr. Yergason. About this time I learned, for the first time through Mr. Yergason, in the presence of Mr. Bacon, that the barley which we thought was in possession of the railroad under a bill of lading which

we held, had already been delivered to Geo M. Bacon & Co. without our authority. My language, I do not remember, but communicated to Mr. Bacon my severe censure of his conduct in very plain terms, for having obtained the property under the circumstances. The note was left with us at that time; I told him it would not be discounted to check against, but we would take it and credit proceeds on claim of the Quebec Bank, taking said note on account of said Quebec Bank."

And on page 26 (Printed Record) on cross-examination he was asked: "Was anybody present at either of the interviews you testify to but Mr. Bacon, Mr. Yergason and yourself?" Ans. "No sir."

Mr. Yergason (Printed Record, p. 20) says:

"The note of Weyand & Jung, dated February 7, 1870, five thousand dollars at sixty days was left with me on the morning of that day for discount. I handed the same to the President of the Merchants' National Bank Mr. Fallis, but it was not discounted by that bank. I next saw the note in the afternoon of the 7th of February after banking hours, when it was handed to me in my office by Geo. M. Bacon (S. C. Hughes was then present) and taken by me for the Quebec Bank of Toronto. During the conversation, the draft and bills of lading for barley, which we held for the Quebec Bank of Toronto were mentioned and upon being informed by Bacon & Co. that they could do nothing more towards payment than give this note, I replied that we must hand the barley over to Perin & Gould for sale as instructed, for the balance. Upon being informed by them, Bacon & Co., that they had already obtained the barley and sold it, I was surprised and said I believe they had laid themselves liable to the States prison for obtaining goods under false pretenses. I took it for the Quebec Bank of Toronto and they are the present owners of it. I handed it to the President the same evening, February 7. It was not out of the possession of the Merchants' National Bank until handed to the attorneys for suit at the direction of the Bank."

And on page 32 (Printed Record) on cross-examination he says:

"I saw both members of the firm of Geo. M. Bacon &

Co. late in the afternoon of the same day (February 7) when they came into my office and left the note above referred to, and upon my saying if they could do nothing more towards paying their past due acceptance we would be obliged to hand the barley over to Perin & Gould for sale as per instructions, they then informed me that they had already obtained the barley and sold it. This interview occurred about four o'clock as near as I can recollect. Geo. M. Bacon, S. C. Hughes and myself were present. Said five thousand dollar note was produced at that interview and handed to me by George M. Bacon, and left as a part payment on the past due acceptance of Bacon & Co."

Geo. M. Bacon (Printed Record, 41) testifies as follows:

"We, Geo. M. Bacon & Co. had an acceptance due the Merchants National Bank on Clarkson & Co., Toronto, Canada, through the Quebec Bank of Toronto, balance payment on a lot of barley purchased of them for something over six thousand dollars payable in gold. The Merchants National Bank demanded the payment of the same and I went to Weyand & Jung and asked them for an accommodation paper for sixty days to take up said amount. I found Mr. Jung was sick abed and I filled out this note for five thousand dollars, payable sixty days after date, which Mr. Jung signed. I took it down to the Merchants' National Bank and asked them to discount it, and was told by Mr. Yergason, the cashier, to leave it there till the directors of the bank met, which was about noon, I believe. Going there after 'Change, between one and two o'clock, he told me that they didn't like the paper and would't accept it. I took the note down to our office and gave it to Sanford C. Hughes, my partner. After giving the note to Mr. Hughes, who endeavored to realize on it, and not succeeding, we made an assignment on the 9th of February, 1870. We took the note up to Mr. Douglass' office, who is our attorney, and stated to him what we had endeavored to do. When coming down out of his office, about three o'clock, at the corner of Fourth and Walnut we met Mr. Weiszmann, who informed us that Mr. Yergason wanted to see us at the bank; we went down together to the bank, and went in to Mr. Yergason's office, and Mr. Yergason asked to see the note; Mr. Hughes took it from his pocket and handed it to him,

finally decided. Their situation at the time this transaction occurred, was such, that everything must have been indelibly fixed in their minds. They were both young men, engaged in their first business venture and in the prosecution of which, they had prior to that time been successful, and had won the esteem and confidence of the men with whom they had transacted business. For the first time in their business relations, where the orignal draft in evidence in this case, was about to mature, they found themselves unable to pay an obligation at maturity. They still hoped and believed, however, if they could get an extension of time for payment, they could pay the claim and continue business. They obtained this note from Daniel Jung, of the firm of Weyand & Jung, as the evidence abundantly shows purely as a matter of accommodation, and for the purpose of getting it discounted, and with the money thus obtained, and what they had on hand, to pay the draft of the appellant, then past due.

The rejected note, given for an extension of time, was not by its terms then due, but was about to mature. With them it was a struggle to continue business, and all that was done in that direction, must be clearly impressed upon their memories. The refusal of the Merchants National Bank to discount this note, and their consequent inability to pay the claim of appellant was the sole reason for making their assignment. They exhausted every means within their power to put the said note in such condition as to make it acceptable to the bank before they finally executed their deed of assignment. Had said note been received on the 7th of February as now claimed by Fallis and Yergason, it would have accomplished the purpose for

which it was obtained, there would have been no occasion for trouble or hard words, or, threats, and no occasion for making an assignment.

Bacon and Hughes cannot fail to remember all that they did or attempted to do to relieve themselves of their difficulties. They cannot be mistaken. If they have testified falsely, they must have done so wilfully.

On the other hand Mr. Fallis and Mr. Yergason in the multiplicity of their business transactions connected with a large bank and its operations, may easily be mistaken and indeed it would be wonderful if they were not at fault in dates and many incidents connected with this transaction. True to their habits and training as bankers, they seemed specially intent on getting all the securities they could, and holding on to all they had. At the time they got possession of this note, whether on the 7th, 8th or 9th of February, 1870, they had the original draft for $6,502.56, dated Nov. 10, 1869, payable twenty-five days after date in gold, accepted by Geo. M. Bacon & Co. and attached to which was a bill of lading for fifteen thousand bushels of barley, and also the note of Geo. M. Bacon & Co., endorsed by John Hughes for the sum of $6,616.35, in gold, dated December 23, 1869, payable forty-five days after date to the order of Thomas Clarkson & Co., neither of which was then, or has since been endorsed or credited with any payment whatever. And it is certainly true that Mr. Fallis and Mr. Yergason, do not now agree in their recollection of the transaction if we are to judge of such recollection by their testimony, and their version of the transaction now differs essentially from that given in the letter of February 11,

1870, from Yergason to Bethune, appellant's manager, which was as follows: (P. R. p. 34.)

"As you requested I demanded payment of Bacon & Co. They informed me that they could not pay, and that they had already received the barley and sold it. Since then they have made an assignment (10th inst.), but we hope we have secured your claim. We still hold the B. L. attached to draft, $6,502.56 gold, due December 8th. Fifteen thousand bushels of barley shipped to your order at Brighton station, care Reynolds, Whiting & Bangs, Toledo, Ohio. The Toledo firm forwarded *via* canal instead of rail, and thus enabled Bacon & Co. to obtain possession of it. The error was in your taking a B. L., care of R. W. & B., Toledo, Ohio. I enclose protest with Bacon & Co. $6,616.35 gold, received in your favor of the 10th of January for the endorsement of T. Clarkson & Co. after which please return to us, we have obtained note of Weyand & Jung $5,000, 7th February, sixty days endorsed by Hughes which can be sold here if you desire. We think there will be no loss but it will take a little time for Mr. Hughes to arrange matters so that he can pay."

Mr. Fallis now thinks, or at least so testifies, that the note in controversy was received for appellant under an agreement to apply it in payment to that amount reduced to gold, on the note dated December 23, 1869, and that it was so received on the 7th of February, 1870. Is this true? We think it is not, and that all the acts and declarations of the parties show that it is not.

1. The note for $6,616.35 was, on the 9th day of Feb'y, 1870, and two days after it is claimed by Mr. Fallis, said $5,000 note was received to be applied as payment on said note, at the instance of the Merchants National Bank, and under the direction of Messrs. Fallis and Yergason, and without any payment or endorsement thereon, protested for non-payment.

2. Had the agreement been to receive said note in payment as claimed, the object of Geo. M. Bacon & Co. in getting the note would have been fully accomplished, and the necessity on their part of making an assignment at that time would have been avoided. Indeed, if Mr. Fallis is correct in his recollection, there could have been no reason for hard words or ill feeling, which all admit to have characterized the interview at the time the Merchants National Bank got possession of this note.

3. The letter of Yergason to Bethune hereinbefore set forth, dated February 11, 1870, and the two letters of Bethune, dated February 15, 1870, one to Yergason (P. R., p. 34), and one to Reynolds, Whiting & Bangs, Toledo, (P. R., p. 35) all written immediately after the transaction, show conclusively that Messrs. Fallis and Yergason are in error. The last two letters referred to are as follows:

"I wrote you last on the — and have since received your letter of the 11th inst. I return Bacon's note $6,616.35, gold, endorsed by Hughes and Clarkson, latter without recourse. Please do your best to collect this from Hughes. If he wants time he ought to give security. If he sells his real estate without giving security, are we sure of getting proceeds? Please give me your opinion of the standing of Weyand & Jung, whose note you have for $5,000, and say what it could be sold for. If a good note I would just as soon hold it, as we have plenty of money this winter. Is it gold or currency? I enclose Messrs. Clarkson's letter to Messrs. Reynolds, Whiting & Bangs instructing them to ship on the barley to order of Quebec Bank, Brighton Station. As they have never received any other instructions, surely they or the owners of the canal boat are liable. I also enclose a copy of my letter to Reynolds, Whiting and Bangs of to-day's date. Please advise me what is best to be done next and take any legal steps you may deem necessary at our expense. We ought to have undoubted security for the bill 8th December, $6502.56 gold, and legal interest.

"P. S. I don't want to come on Clarkson, drawer of draft here if it can be avoided."

"REYNOLDS, WHITING & BANGS, TOLEDO:

"DEAR SIRS—I wrote to you last on the —, and have since received your letter. I enclose copy of letter to you from Thomas Clarkson & Co., of this city, instructing you to forward barley, ex Smith & Post, to our order, Brighton Station, Cincinnati.

"It appears that this barley has been delivered to Messrs. Bacon & Co., Cincinnati, without any order from us or our agents, the Merchants' National Bank. As we may not have sufficient security for our claim on this barley. Will you please press the owners of the canal boat to deposit security with the Merchants' National Bank, Cincinnati, otherwise we must take proceedings against them."

In all this correspondence there is not a suggestion or an intimation that the $5,000 note had been received or was to be treated as a payment on either the draft or note previously held. Mr. Fallis claims, it was to be received as payment on the note, Mr. Yergason, that it was payment on the draft. (See answer to cross interrogatory 15, P. R., p. 32.)

4. The institution of a suit in the Superior Court of Cincinnati on said $6,616.35 gold note (P. R., p. 8,) at the instance and under the direction of Mr. Fallis, claiming to recover the full amount of said note and interest, is evidence conclusive that he did not then understand that this $5,000 note was received as a payment on said note.

Mr. Bacon and Mr. Hughes are fully corroborated by the testimony of Frederick C. Weiszmann and Howard Douglass. Weiszmann had the note in his possession on the morning of February 9th, 1870, and went with it to Kauffmann to get it endorsed by him if possible.

Douglass saw it when the deed of assignment was

signed. Bacon & Co. spared no efforts to put said note in such condition as to make it available for the very purpose that Mr. Fallis now claims he agreed to at the outset, and thus enable them to continue business. What motive could Bacon & Co. have had on the eve of making an assignment to get an accommodation of old and tried friends to turn over to a foreign creditor.

Such an act on their part would have been unnatural and most discreditable as it is unreasonable. The undisputed facts in the case all show that the testimony of Bacon and Hughes is true, and that there never was any such delivery of this note to the Merchants National Bank as agent of the appellant, as to vest title to the same in appellant.

All the circumstances surrounding the transaction corroborate the truth of the testimony of Bacon, Hughes, Weiszmann and Douglass, and indeed their testimony alone, establishes in our opinion conclusively the fact, that the note could not have been and was not obtained by the Merchants National Bank until the 9th day of February, 1870, and after the said assignment had been made for the benefit of the creditors of Bacon & Co.

II.

The Merchants National Bank did not get possession of this $5,000 note until after Bacon & Co. had executed a deed of assignment to John Hughes for the benefit of their creditors, and delivered the same to Howard Douglass, attorney, to be delivered to the said John Hughes, who was not present at the time of its execution, and even if Bacon & Co.

had then attempted to transfer the legal title to said note they could not have done so effectually.

The deed of assignment when executed, was left with Douglass, the attorney who drew it, to be delivered to the assignee and filed in the Probate Court, and proceeded with according to law. The next day the assignee accepted the trust and was duly qualified as assignee. The title to the property of Bacon & Co. vested in the assignee from the time of such delivery to Douglass, which delivery was made prior to the time that Bacon and Hughes went to the Merchants National Bank on the 9th of February, 1870, and prior to the time that said note came into the possession of the officers of said bank.

"When the assignee or trustee is not present, and an interval necessarily elapses between the time of delivery of the instrument and its actual receipt, the deed will be held to take effect as a transfer of the property as against creditors from the time of the first delivery by the assignor or grantor, subject to being defeated by the dissent or refusal of the trustee, and the assent of the latter may be presumed in the first instance for the purpose of giving operation to the deed."

*Burrill on Assignments* (3d Ed. by Bishop, 396, Sec. 296, and cases cited in note 1, p. 397.)

*Fiske vs. Carr*, 20 Me., 301.

Although not material in this case, since the assignee did accept, we insist that under the Statute of Ohio then in force relating to assignments for the benefit of creditors, acceptance by the assignee in no manner affects the validity of the deed or the time when it takes effect, since if the assignee named refuses to accept, the statute made it the duty of the Probate Court to appoint one who will execute the trust, and hence under said statute, a deed of assignment took

effect and was operative to divest the assignors of title or right to dispose of property from the time it was executed and authority given to act upon it.

*Swan & Critchfield's Stats.*, Vol. 1, page 709, Secs. 1 and 2.

So much of said sections as are material to this case are as follows:

SEC. 1. "That when any person shall make an assignment to a trustee of any property, money, rights or credits in trust for the benefit of creditors, it shall be the duty of said trustee within ten days after the delivery of the assignment to him, *and before disposing of any property so assigned*, to appear before the Probate Judge of the county in which the assignor resided at the time of executing the said assignment, produce the original assignment or a copy thereof; cause the same to be filed in the Probate Court and enter into an undertaking payable to the State of Ohio, in such sum and with such sureties as shall be approved by the judge, conditioned for the faithful performance by said trustee of his duties according to law."

SEC. 2. "If any assignee as aforesaid shall not within ten days after his nomination to such trust, comply with the provisions of the first section of this act, it shall be the duty of the Probate Judge on application of the assignor or any one or more of his creditors, to remove the said assignee and appoint another in his stead, who shall thereupon immediately comply with the provisions of the foregoing section; and the Probate Judge shall make and enforce all necessary orders to put the said trustee so appointed into possession of any property, money, rights or credits belonging to the assignor at the time he made said assignment."

That the note in controversy was in the possession of Bacon & Co., at the time the assignment was made and the deed of assignment delivered is shown by the testimony of Hughes, Bacon, Douglass and Weiszmann, and is contradicted by no one except inferentially.

In other words, the claim in opposition to this view is,

that if the note was in the possession of the Merchants National Bank on the 7th of February, and was not out of its possession until delivered to attorneys to be sued, it could not have been in the possession of Bacon & Co. on the 9th of February.

It would be strange indeed if four men wholly disinterested, and who have no conceivable motive to falsify, should wilfully perjure themselves. The deed of assignment was executed and dated with no reference to this controversy, and its date with the testimony of the four witnesses above named, together with the date of filing in the Probate Court, leave no reasonable ground to doubt that the Merchants National Bank, or its officers did not get possession of said note until the evening of the 9th of February, 1870, and after Bacon & Co. had executed and delivered the r deed of assignment.

Bacon & Co., after they had executed and delivered their deed of assignment, had no power to transfer this note to the appellant, as the title to the same was in the assignee, nor could the assignee transfer it, had he attempted so to do, which is not claimed, except as assignee.

*Woodford vs. Darwin.* 3 Vt., 82.

"The assignment of an insolvent debtor passes all his property whether mentioned in the schedule or not."

*Hilliard on Bankruptcy.*

And the following cases cited in note 6.

*Cooper vs. Henderson*, 6 Binn., 189.

*Shirley vs. Long*, 6 Rand., 735.

*Bank, etc. vs. Horn*, 17 How., 157.

*Hutton vs. Self*, 6 Ind., 285.

An assignment under the Insolvent Act is *ipso facto*, a dissolution of the partnership.

*Collier on Partnership*, Vol. 1, (6 Ed.), 162.
*Davis vs. Grove*, 2 Robertson, (N. Y.) 136.
*Bank vs. Horn*, 17 How., (U. S.), 157.
*Merrick vs. Brainard*, 38 Barb., (N. Y.), 574.

III.

The use made of this note by Bacon & Co., if the theory of appellant is to prevail, was such a fraud upon the makers of the note as would vitiate the same.

The representations made to Mr. Jung, of the firm of Weyand & Jung, and who alone signed and executed said note, were that they wanted the note to pay the draft, and get the barley and enable them to continue business. To obtain an accommodation note and turn it over on a prior debt, on the eve of the making an assignment would have been a gross fraud.

IV.

The making of accommodation notes is not within the legitimate scope of a business partnership, and the firm is not liable upon such paper executed by one of the partners alone, unless express authority to execute the same is shown, and the burden is on the party seeking to enforce such liability to show such authority.

*Parsons on Partnerships*, 215 *et seq.*
*1 Lindley on Partnerships and Companies*, 248 *et seq.* (Third Eng. Ed.)
*Story on Partnerships*, § 127 and notes.

The evidence in this case shows that this note was executed by D. Jung only, and there is nothing to show that P.

Weyand either knew of or assented to the giving of the same, and hence the firm of Weyand & Jung are not liable on the note.

The appellee is assignee of the firm and not of the individual members of the firm, and he never can only be required to pay firm debts.

As such assignee, he has no power or right to pay individual debts out of the assets in his hands.

For an act done by one partner on behalf of the firm, not necessary for the carrying on of the partnership business in the ordinary way, *prima facie*, the firm will not be liable.

The firm will not be liable unless an authority to do the act be shown.

*Dickinson ex. Valpy*, 10 B. & C., 128.

If all that can be said of the act is that it was convenient or facilitated the transaction of the business of the firm, that is not sufficient in the absence of sanction by the other partners.

*Bethel ex. Williams*, 4 Exch., 620.

*Ricketts ex. Bennett*, 4 C. B., 686.

Believing that each one of the foregoing propositions is correct, and fully sustained by the adjudications of courts whose opinions are of greatest weight, as well as by the evidence in the case, and that the decision of the Court below was right, we confidently expect and ask its affirmance.

JOHN F. FOLLETT, AND
ADAM A. KRAMER,
*Counsel for Appellee.*

November 22, 1882.

*Robert Clarke & Co., Printers, Cincinnati, O.* [*Dec., 1883.*

# Supreme Court of the United States

OCTOBER TERM, 1883.

*The Quebec Bank, of Toronto, Appellant,*

*No. 179.* *vs.*

*Max. Hellman, Assignee of P. Weyand and D. Jung, partners as Weyand & Jung, Successor to John Schiff, as Assignee of said Weyand & Jung.*

**REPLY TO BRIEF FOR APPELLEE,**

**By STALLO, KITTREDGE & WILBY.**

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**REPLY TO BRIEF FOR APPELLEE,**
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By inadvertence, the section of the Revised Statutes of Ohio (6335), original brief, p. 6, is a mistake upon our part. This section quoted by us was enacted *after* the transaction in question in this case, and the section of the law in force at the time of this transaction, is correctly quoted by our adversaries, on page 17 of their brief.

Our adversaries are inaccurate in stating (Brief, p. 20), that the appellee is assignee of the firm, and not of the individual members of the firm. The stipulation in the Record, p. 8, is that the assignment of Weyand & Jung is of all of the firm assets and individual property of the assignors, and the deed of assignment, upon p. 56 of the Record, is by the individual members, as well as by the firm.

The proposition of our adversaries, that the title to the note in question in this case passed by the assignment of George M. Bacon & Co. to their assignee, if it had not at that time been transferred to appellant, is the converse of the proposition submitted by us in our original brief, that the accommodation paper of Weyand & Jung held by George M. Bacon & Co. did not pass by their assignment to their assignee. We do not find that the case cited by our learned adversaries upon this point sustains their proposition; but we do find that the proposition for which we contend, and which we supposed would not be controverted, is laid down in Byles on Bills, 6th edition, marginal page 457, from which we quote, as follows:

"But, as, in general, property in which a bankrupt has no *beneficial interest* does not pass to his assignees, he may, after an act of bankruptcy, indorse a bill accepted for his accommodation, so as to convey to his indorsee a right of action against the accommodation acceptor."

And, upon marginal page 458:

"If a man already bankrupt be payee of a negotiable bill or note, the acceptor or maker can not dispute the payee's capacity to indorse."

These propositions of the learned author are sustained by a citation of cases in point.

If our adversaries mean, by affirming that "the evidence in this case shows that this note was executed by D. Jung only" (Brief, p. 19), to question that this note was a firm note, because it is executed with the initials of the individual partners, then we call the attention of the Court to the testimony, showing that this was the usual form of signing the firm name to commercial paper by the partnership, found in the deposition of K. F. Bendorf (R., p. 12) 1st to 5th interrogatory, inclusive, and the testimony of

Edgar Stark (R. p. 14), 2nd to 4th interrogatory, inclusive.

Turning now to a more thorough analysis of the testimony, upon which our adversaries claim that George M. Bacon & Co. had possession of the note in controversy until after their assignment on the 9th of February, which they say "is shown by the testimony of Hughes, Bacon, Douglass, and Weiszmann, and is contradicted by no one except inferentially." (Brief, p. 17.) The testimony of Frederick Weiszmann, already cited by us, in his cross-examination, shows clearly that, so far as his evidence is concerned, even if this note was delivered to the Merchants' National Bank of Cincinnati, on the 9th, and not the 7th, of February, it was prior to the execution of the assignment by George M. Bacon & Co. His testimony in chief is in harmony with his cross-examination to which we had referred. Thus, in his narrative of the transaction, in answer to question 7 (R., p. 37), he says that Mr. Yergason called to see him, and sent a message by him to Mr. Bacon and Mr. Hughes. We quote his language: "He told me to find them, and for them to bring down the note; that he would fix it up for them. I went up to Douglass' office, at the corner of Walnut and Fourth, and saw Mr. Bacon and Mr. Hughes; told them what Yergason said to me. Mr. Bacon told me, 'All right;' got into the buggy with Mr. Hughes; told me to follow them to the Merchants' National, and they would let me know whether it would be forced upon them or not; if Yergason took this note they would n't need to make an assignment. I followed them, and saw them go into the Merchants' National; when they came out, they made some remark to me, which I don't now remember."

His cross-examination, already cited by us, should be

read in connection with this statement in his examination in chief. He says (R. p. 39):

Cross-Q. 12. When you went up to Douglass' Office, without going in, as you say, how did you make them aware of your presence?

A. I went part way up the steps, and told some one there I wanted to see Bacon and Hughes; I then returned to the pavement, and they came down to where I was, when I told them of what Yergason wanted of them.

Cross-Q. 14. What, if any thing, did Huges or Bacon say to you about an assignment, or a contemplated assignment, of their firm?

A. They told me if Mr. Yergason would accept this note, that they would not need to make an assignment; that is, give them credit for that note on their books. They went right down to the bank, and went in, stayed a short time, then came out and drove off. I did not see the note then.

Cross-Q. 15. When you met them upon the street in front of Douglass' office, and they said they would not have to make an assignment if the note was taken by Mr. Yergason, what did they say to you as to whether the assignment had been already executed, or that they would avoid an assignment?

A. They told me that if he would take the note they would avoid making an assignment. They intimated to me that the papers were ready to sign.

Cross-Q. 23. State whether or not you testified (in a former trial when they came out of the bank) they may have said, "it's all right," or "they had got it fixed," that's what I understood them.

A. Yes, in passing remark as they drove by me in

the buggy, it now comes to my memory that they did so state.

Surely, this testimony does not sustain the assertion of our adversaries to which we have referred.

Turning now to the testimony of Mr. Howard Douglass, we introduce it by a reference to the statement by our learned adversaries on page 13 of their brief, that all the parties admit, that hard words and ill-feeling characterized the interview between the parties at the time the Merchants' National Bank got possession of this note. The hard words and ill-feeling detailed by Mr. Fallis, the President, and Mr. Yergason, the Cashier, grew entirely out of the fact, that George M. Bacon & Co. had, by covin and fraud, obtained possession of the barley, for which the Merchants' National Bank held the bill of lading as collateral security, without the knowledge or consent of the bank. Now, Mr. Hughes and Mr. Bacon both positively affirm, that they, neither of them, had any conversation with the officers of the bank in relation to their thus having received and sold this barley until *after* they, George M. Bacon & Co., had made their assignment. This testimony of George M. Bacon will be found in his answers to questions 10 (R. p. 42), and cross-question 12 (R. p. 45). Mr. Hughes' testimony to the same point will be found in answer to cross-question 14 (R. p. 50).

Mr. Douglass begins his testimony in answer to question 2 (R. p. 51), and, in answer to question 4, by a statement, that, when George M. Bacon & Co. first called to consult him in reference to making an assignment, they stated to him as a reason for their making it, that the Merchants' National Bank had THREATENED to commence criminal proceedings. In cross-examination (R. p. 55), cross-questions 35 and 36, he fixes very definitely this

communication to him, by George M. Bacon & Co., of the THREATS of the Merchants' National Bank to commence criminal proceedings, as being two or three days before they executed their assignment. This certainly fixes very definitely the date of the interview, when the hard words and ill-feeling occurred, as being the 7th of February, as Mr. Fallis and Mr. Yergason both testified. We agree with our learned adversaries, that all the evidence shows that it was at an interview when hard words occurred, that the Merchants' National Bank got possession of the note in controversy.

But Mr. Douglass' testimony is significant as to another fact, in that it is strongly confirmatory of Mr. Weiszmann's evidence, that, even if the note in question came into the possession of the bank on the 9th of February, instead of the 7th, it was before the execution of the assignment of George M. Bacon & Co.

In answer to cross-question 26 (Rep., p. 54), he testifies as follows:

Cross-Q. 26. When you saw Bacon and Hughes, on the 9th of February, at your office, as you say, and also Mr. Weiszmann, do you recollect whether they came together or not?

Ans. Bacon came to my office, as I now recollect, and waited until Hughes came back from the Merchant's National Bank, where he went with Weyand & Jung's note for $5,000. He came back with the note; stated that he could not discount it, produced the note, and then each signed the assignment. Whether Weiszman was there at that particular time, or not, I don't know; but he was there that day.

It is thus apparent that, when Bacon and Hughes went

to the Merchant's National Bank, on the 9th of February, they had not yet signed the assignment.

They were not, according to the testimony, at the Merchants' National Bank on that day, but upon the single occasion when they delivered the note in question to the officers of the bank. And, although Mr. Douglass testifies that, upon their return to his office, they brought the note with them, Mr. Bacon and Mr. Hughes both testify that they left it at the bank when they were there upon that day. Mr. Douglass is evidently, and quite naturally, in error in his recollection as to Mr. Hughes having the note in his possession when he came back from the bank.

When the Court reads the testimony of Howard Douglass, it will see that he has no means of fixing any date connected with his professional service and advice to his clients, Bacon & Co., in respect to this transaction, and that his recollection on the subject is entirely indistinct—the only significant facts in his evidence being, that he thus fixes his knowledge of the THREATS OF THE BANK, to commence criminal proceedings on account of the way in which George M. Bacon & Co. had obtained possession of this barley, as having been communicated to him at his first interview with his clients, on the 7th of February, and his confirmation of the evidence of Weiszmann, that, if the note in question came into the possession of the bank on the 9th of February, it was *before* Geo. M. Bacon & Co. signed their deed of assignment.

We then have Messrs. Fallis and Yergason testifying, that the bank came into possession of this note on the 7th of February; Messrs. Weiszmann and Douglass testifying, that it was on the 9th of February, but *before* the assignment of George M. Bacon & Co.; and George M.

Bacon and Sanford Hughes, that it was on the 9th of February, *after* they had signed their deed of assignment.

At this point in the argument, our learned adversaries compare the reliability of George M. Bacon and Sanford Hughes, as disinterested, credible witnesses, with Mr. Fallis and Mr. Yergason, the officers of the bank. Of course, we can not agree with their conclusion in this comparison. In the light of the facts of this transaction, upon which threats were made to commence criminal proceedings against them—those facts being that they had fraudulently obtained possession of ten thousand bushels of barley, of which the appellant had the title and the bill of lading as collateral security for an indebtedness due to it, we do not think that they appear in this case as very reliable men. But, with the evidence of Mr. Fallis and Mr. Yergason as to the date and the circumstances under which they came into possession of this note (confirmed by the memorandum, in writing, in the stamp box of the bank, for the stamp upon the note, and by the letters of the bank to the appellant immediately after the transaction, reciting what had occurred, and, by the evidence referred to, as to when they learned from Bacon & Co. of the loss of the barley), it seems to us that their evidence is unshaken. While the testimony of Messrs. Bacon and Hughes, that the officers of the bank seized this note, against their consent, and that they left the bank, on the 9th of February, in indignation at this act of the officers of the bank, is as flatly contradicted by the conduct of Mr. Bacon in procuring Mr. John Hughes to go with him, on the 11th of February, to the bank and indorse this note, which, according to him, the bank thus wrongfully held, as though he expressly testified that Sanford Hughes' testimony, in reference to this transaction, was a falsehood.

When this case of the appellant is fortified by the presumption arising from the possession of the note, and its offering it in evidence, properly indorsed, that the appellant became the holder of it for value, at its date, in the usual course of business, without notice of any thing to impeach its title, the case in its behalf, upon the issue of fact involved, seems to us to be conclusive.

STALLO, KITTREDGE ~~& WILBY~~,

*Of Counsel for Plaintiff.*